THE UNIVERSITY OF CHICAGO

LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND HOMOGENIZATION OF THE NATION

A DISSERTATION SUBMITTED TO

THE FACULTY OF THE DIVISION OF THE SOCIAL SCIENCES

IN CANDIDACY FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE

BY

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CHICAGO, ILLINOIS

JUNE 2005

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ABSTRACT

The driving question of my research project is: How has the higher judiciary in independent India interpreted the right to freedom of religion and in turn influenced the discourse on nationalism and secularism? Unlike courts in other multi-religious democracies, notably the United States, the Supreme Court in independent India has been not only actively involved in defining religion but also examining the veracity of religious doctrine. My dissertation examines this tension between court judgments that seek to define the essence of religion, especially Hinduism, and in many ways to 'rationalize' it in a society where religion occupies a prominent space.

I argue that the Supreme Court has worked with a 'high modernist' and 'rationalist' definition of religion and sought to cleanse religion of what it reads as superstition. This, I propose, has contributed to a homogenization of religion as well as the nation by not taking into account the pluralism of the Indian polity and the rights of minorities. I pay particular attention to the judicial discourse on Hinduism since the courts and the legislature have become the primary agency of Hindu religious reform after independence. The Indian state has had to negotiate the dual task of religious evenhandedness on the one hand and religious reform on the other. My research explores this duality and the tensions associated with it.

CHAPTER I

INTRODUCTION

One of the principal concerns of contemporary political science is the relationship of religion to politics and the state. The role of religion in the Indian public sphere is actively contested both within the academy as well as in popular discourse. However, too often the constitutional and legal underpinnings of the issue of freedom of religion in India are underplayed. Examining the underpinnings is an effective way of studying the relationships of religion and the state. The driving question of my research project is: How has the higher judiciary in independent India interpreted the right to freedom of religion and in turn influenced the discourse on nationalism and secularism?

In most nations recognized as secular constitutional polities, the courts are confronted with the question of defining religion when deciding cases related to religious freedom. The Indian Supreme Court is no exception. However, unlike courts in other multi-religious democracies, notably the United States, the Supreme Court in independent India has been not only actively involved in defining religion but also examining the veracity of religious doctrine. This is what is referred to as the 'legalization of religion' and stands in contrast to dominant theories on religion in US jurisprudence.

The judiciary has been called upon on several occasions to arbitrate questions

related to religion, and especially interpret Articles 25 and 26 of the Indian Constitution, which enshrine individual and collective freedom of religion and culture. The courts have also been asked to adjudicate on various central as well as state-level statutory laws touching on freedom of religion and culture. In the course of its judgments, the higher courts have attempted to mark out the boundaries of religion and in the process strongly influenced the course of secularism in India. Unlike the US, which applies the doctrine of separation between church and state, the Indian state is constitutionally committed to supporting all religions and to do so equally.

My dissertation examines this tension between court judgments that constantly seek to define the essence of religion, especially Hinduism, and in many ways to 'rationalize' it in a society where religion occupies a prominent space and religious conflicts are frequent. I argue that the Supreme Court has worked with a 'high modernist' and 'rationalist' definition of religion and sought to cleanse religion of what it reads as superstition. I borrow the term 'high modernism' from James Scott who defines it as a "strong, one might say even muscle-bound, version of the self-confidence about scientific and technical progress, the expansion of production, the growing satisfaction of human needs, the mastery of nature (including human nature), and above all the rational design of social order commensurate with the scientific understanding of natural laws."[1] This, I propose, has contributed to a homogenization of religion as well as the nation by not taking into account the pluralism of the Indian polity and the rights of minorities. I pay particular attention to the judicial discourse on

[1] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 4.

Hinduism since the courts and the legislature have become the primary agency of Hindu religious reform after independence. The Indian state has had to negotiate the dual task of religious evenhandedness on the one hand and religious reform on the other. My research explores this duality and the tensions associated with it.

One of the reasons that the judicial verdicts assume crucial importance is because the courts are seen as one of the few institutions that can be trusted in a polity where corruption and lawlessness is endemic. Lloyd and Susanne Rudolph have noted: "As executives and legislature were perceived as increasingly ineffectual, unstable and corrupt, the supreme and high courts, the presidency, and the Election Commission became the object of a middle class public's hope and aspirations, only partially fulfilled, that someone would defend a government of laws and enforce probity and procedural regularity."[2] According to the Rudolphs, the courts have "played a critical role in approximating a framework of lawfulness and predictability that has had some success in protecting citizens' rights, limiting malfeasance and safeguarding environmental and other public goods."[3] The faith in the judiciary is borne out by an all-India survey conducted in 1996, where nearly 42 per cent of the people said they had a "great deal" of trust in the judiciary as opposed to only 17 per cent for political parties and 20 per cent for elected representatives.[4]

My research broadly addresses the following issues: What interpretative

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[2] Lloyd I. Rudolph and Susanne Hoeber Rudolph, "Redoing the constitutional design: from an interventionist to a regulatory state," in Atul Kohli ed., *The Success of India's Democracy* (Cambridge: Cambridge University Press, 2001), 131-132.

[3] Ibid., 132.

[4] Subrata K. Mitra and V.B. Singh, *Democracy and Social Change in India: A Cross Sectional Analysis of the National Electorate* (New Delhi: Sage, 1999), 260.

traditions and legal doctrines have the courts developed in their judgments involving freedom of religion? How have the courts defined Hinduism and who qualifies as a Hindu? How have the courts decided what is 'essential' to religion and hence subject to Constitutional protection? Have the courts been true to the vision of the framers of the Constitution? What are the effects of the judicial discourse on Muslim personal law in the Indian context?

The primary research materials used for this project are Supreme Court judgements from 1950 onwards, when the Indian Constitution came into effect. However, the effort is to move away from a narrow or strictly 'legalistic' reading of court judgements and place them in the wider context of the discourse on religion, nationalism, secularism and minority rights. With this in mind I have examined the extra-judicial writings of judges as well as interviewed prominent retired Supreme Court judges. I have also looked at the political and social context of the court judgements.

In examining the court judgments I use the method of discourse analysis as broadly outlined by Michel Foucault. I use the concept of 'discourse' as Alan Hunt and Gary Wickham interpret Foucault: "Discourses put in place a set of linked signs. What the concept captures is that people live and experience within discourse in the sense that discourses impose frameworks which structures what can be experienced or the meanings that experience can encompass, and thereby influence what can be said and done. Each discourse allows certain things to be said, thought and done and

impedes or prevents other things from being said, thought and done."[5] They go on to point out that discourse "authorizes some to speak, some views to be taken seriously, while others are marginalized, derided, excluded and even prohibited. Discourses impose themselves upon social life, indeed they produce what it is possible to think, speak and do."[6] It is important to note that the Supreme Court, due to its exalted position, can make certain truth-claims about religion that result in the marginalization of other claims. It is in this sense that I analyze the court judgements on religion as representing a dominant discourse.

If discourse is understood in this manner it will be seen that the language of the court judgments is crucial to uncovering different layers of meaning in the judicial discourse. Hence, I pay careful attention to how court rulings are framed and the sources that are invoked to legitimize the court's views on religion. The importance of 'authoritative' sources in court judgements can be interpreted in terms of what Foucault refers to as the "author function." According to Foucault, the author function is "characteristic of the mode of existence, circulation and functioning of certain discourses within a society."[7] Foucault also identifies what he calls the "founders of discursivity" — figures such as Marx or Freud — who establish "an endless possibility of discourse." In the context of the Indian courts this is particularly true for the Hindu reformers of the late nineteenth century who function as founders of discursivity. However, what is extremely important is the way the "founders" are

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[5] Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994), 8.
[6] Ibid., 9.
[7] Paul Rabinow ed., *The Foucault Reader* (New York: Pantheon Books, 1984), 108.

appropriated both by the courts as well as the Hindu nationalists. What is also noteworthy is that the judicial discourse transcends the boundaries of the courts, circulates and is transformed as it comes into contact with other discourses.

In the first chapter, I examine how the Supreme Court has defined Hinduism and the consequences of the attempts to define Hinduism. The court's proclivity to define religion, especially Hinduism, can be seen as flowing partly from Articles 25 and 26 — often referred to as the freedom of religion clauses — of the Indian Constitution. Article 25 allows the state to regulate or restrict any "economic, financial, political or other secular activity which may be associated with religious practice." It also provides for "social welfare and reform" of Hindu religious institutions. Article 26 guarantees religious denominations, among other things, freedom to manage their religious affairs. Since the "wording of Articles 25 and 26 establishes the primacy of public interests over religious claims and provides a wide scope for governmentally sponsored reforms,"[8] the Supreme Court has often had to adjudicate on which religious denomination or institution legally qualifies as Hindu.

I propose that the Supreme Court rulings about what does and does not qualify as Hindu are embedded in a discourse on classical or high Hinduism that originated with the nineteenth century reformation of Hinduism. For the greater part of its existence in independent India the courts appropriated this discourse about classical Hinduism to emphasize the inclusive and tolerant qualities of Hinduism as well as to advocate reform of Hinduism. Perhaps the most influential of these rulings was the

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[8] Marc Galanter, *Law and Society in Modern India* (New Delhi: Oxford University Press, 1997), 247

Supreme Court's judgment in *Sastri Yagnapurushdasji v. Muldas Bhundardas*[9] or the Satsangi case. In this case Hinduism was memorably described as a "way of life." This term was borrowed from Sarvepalli Radhakrishnan's description of Hinduism. This understanding of Hinduism would be used in several later court rulings. But in the mid-Nineties — when the Nehruvian consensus on secularism had been severely shaken by the rise of the Hindu nationalists — the Supreme Court in the controversial 'Hindutva' ruling[10] conflated an inclusivist discourse on Hinduism with the exclusivist version of Hinduism propounded by Hindu nationalists. Though the Hindutva judgment was viewed by some as an aberration, I argue that, paradoxically, it was a product of the dominant judicial discourse on Hinduism. I further contend that the inclusivist discourse failed to take into account the pluralism within Hinduism and aided in constructing a monolithic version of Hinduism. This overlap between the inclusivist and exclusivist discourses would be used by the Hindu nationalists in their campaign to legitimize Hindutva.

The second chapter seeks to examine how the Supreme Court has attempted to define religion with respect to the Constitution; and two, how the judiciary has drawn a distinction between the sacred and the secular, particularly in the case of Hinduism. Unlike the United States, where the Constitution stipulates "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," the Indian Constitution combines freedom of religion clauses with a mandate to the state to intervene in religious affairs. Besides Article 25, Articles 15 and 17 of the

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[9] AIR 1966 SC 1119.
[10] *R.Y. Prabhoo v. P.K. Kunte*, AIR 1996 SC 1113

Indian Constitution also prohibit some of the defining practices and usages associated with 'traditional' Hinduism such as untouchability and caste inequality. This has meant that the courts are frequently asked upon to decide what constitutes an "essential part of religion," thereby being off limits for state intervention, and what is "extraneous or unessential," thereby permissible for the state to interfere. Some legal scholars have labeled the court's attempts to define what is fundamental to any religion the 'essential practices' doctrine.[11] Since the essential practices test has been used, with a few exceptions, to judge the constitutionality of Hindu practices, this section primarily looks at the judicial discourse on Hinduism and Hindu practices.

The essential practices test has been used by the Supreme Court to decide a variety of cases. These can broadly be classified under a few heads. First, the courts have taken recourse to this test to decide which religious practices are eligible for Constitutional protection. Second, the courts have used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the courts have employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations. In this section I attempt to show how the court's use of the essential practices doctrine has systematically contributed to a rationalization of religion and religious practices. This has resulted in the sanction for an extensive regulatory regime for Hindu religious institutions and substantial limits on the independence of religious denominations.

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[11] Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," in B.N. Kirpal ed., *Supreme but not Infallible: Essays in honour of the Supreme Court of India* (New Delhi: Oxford University Press, 2000).

Several studies have noted the unusual role of the Indian courts in interpreting religious doctrine and acting as the vanguard religious reform. J.D.M. Derrett has written about the paradox of the Court playing the role of religious interpreter.[12] A more scathing assessment has been offered by Rajeev Dhavan and Fali Nariman, who compare judges to *maulavis* or *dharmashastris*.[13] In a similar vein, Marc Galanter asks whether the Constitution has given the Court a mandate to "participate actively in the internal reinterpretation of Hinduism."[14] I wish to extend this analysis by arguing that by employing a stripped down rationalist definition of religion and classifying any religious practice that falls outside this grid as "superstition" or "accretion", the Supreme Court has dispensed with pluralism and popular practices. This has been particularly true for Hinduism since the Constitution for all purposes can be seen as a "charter for the reform of Hinduism."[15]

The third chapter focuses on a former Chief Justice of the Supreme Court, P.B. Gajendragadkar. The obvious question is why Gajendragadkar? The primary reason for choosing Gajendragadkar is that he authored several leading judgements on religion, including the Satsangi case. However, there are a few other reasons for this choice. First, Gajendragadkar has left behind a substantial body of extra-judicial writings, mostly collections of lectures, as well as an autobiography. Second, he was a judge during a period when many of the fundamental rights enunciated in the Indian Constitution were being first interpreted by the courts. Finally, Gajendragadkar wrote

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[12] J.D.M. Derrett, *Religion, Law and the State in India* (London: Faber & Faber, 1968), 447.
[13] Dhavan and Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," 259.
[14] Galanter, *Law and Society in Modern India*, 251.
[15] Ibid., 247.

judgements on a host of important issues ranging from labor law to personal laws to caste reservations. I argue that Gajendragadkar — who was very Nehruvian in his commitment to the marginalization of religion in the public sphere — is a key figure in the tendency to rationalize and ultimately homogenize Hinduism.

Gajendragadkar's rulings can be analyzed as being inspired by what was, for the early decades of independent India, the hegemonic Nehruvian world-view. Though Gajendragadkar believed that the ideal judge was one who could rise above personal philosophy and beliefs, I submit that Gajendragadkar's rulings were a product of his rationalist and secularist ideology. It is noteworthy that Gajendragadkar was a committed votary of an instrumentalist conception of law and the use of law as social engineering. Gajendragadkar justified social engineering by appealing to the notion of a 'public good', which meant that the courts became the spokesmen for what constituted 'true' religion. This would also result in an implicit homogenization of religion. Much of this homogenization was dictated by the fact that Gajendragadkar, like many of the nationalist leaders, was deeply pre-occupied by nation-building.

The final chapter is devoted to how the courts have dealt with the personal laws of India's largest minority, the Muslims, and the uniform civil code issue. The Supreme Court's intervention in Muslim personal law was most controversial in the now famous Shah Bano case.[16] In this case, Shah Bano, a divorced Muslim woman, sued her former husband Mohammed Ahmed Khan for not providing adequate maintenance under Section 125 of the Indian Code of Criminal Procedure. Khan,

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[16] *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

however, contended that he was not obliged to maintain his former wife under Muslim personal law since he had paid a dower (*mahr*) plus maintenance for three months. The Supreme Court interpreted the Shariat to opine that the "Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife."[17] Writing for the Court, Chief Justice Y.V. Chandrachud regretted that Article 44 of the Constitution, which calls for a uniform civil code, had remained a "dead letter." In a later case, *Sarla Mudgal v. Union of India*,[18] the Supreme Court went further and categorically stated that there was no necessary connection between "religion and personal law in a civilized society."

In both *Shah Bano* and *Sarla Mudgal*, the Supreme Court linked the uniform civil code with national unity and integration. Hence, the Court said in *Shah Bano* that a "common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies."[19] The Court in *Sarla Mudgal* even admonished the Muslims for not giving up their minority "sentiments" for the "cause of the national unity and integration."[20] I propose that the Court's project of homogenizing religion comes across clearly in the personal law cases. The Court's rhetoric can be seen, using Lloyd and Susanne Rudolph's terminology, as an example of legal universalism which "imagines homogenous citizens with uniform

[17] Ibid., 952.
[18] AIR 1995 SC 1531.
[19] *Shah Bano* at 954..
[20] *Sarla Mudgal* at 1538.

legal rights and obligations."[21] This is in contrast to legal pluralism, which gives "expression to India's continuously and variously constructed multi-cultural society."[22] The Court's appeal to legal universalism is as true for Muslim personal law as it is for cases involving religion in general.

A dominant theme of this study is how the Supreme Court has become an instrument for the homogenization of the Indian nation. I have sought to bring this out through an analysis of four different aspects of the judicial discourse: the definition of Hinduism; the essential practices test; the role of the judge; and the question of personal laws and the uniform civil code. A disturbing conclusion of this study is that the Court has become an ally — often inadvertently — of the Hindu nationalists in their aggressive demands for homogenization and uniformity. In that sense the high modernism and rationalism of the Court has profoundly undermined many of its stated goals.

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[21] Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context," in Gerald Larson ed., *Religion and Personal Law in Secular India* (Bloomington: Indiana University Press, 2001), 37.
[22] Ibid., 36.

CHAPTER II

DEFINING RELIGION: THE SUPREME COURT AND HINDUISM

In this chapter I examine how the Court in independent India has defined Hinduism and the consequences that flow from attempts to define Hinduism. The Court's proclivity to define religion, especially Hinduism, can be seen as flowing partly from Articles 25 and 26 — often referred to as the freedom of religion clauses — of the Indian Constitution. Article 25 guarantees the right to "profess, practice and propagate religion," but also permits the state to regulate "economic, financial, political or other secular activity associated with religious practice" as well as provide for "social welfare and reform" of Hindu religious institutions.[1] Article 26 guarantees religious denominations, among other things, freedom to manage their religious affairs.[2] Since

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[1] Article 25 (1) Subject to public order, morality and health and to other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.
(2) Nothing in this article shall affect the operation of any existing law or prevent the state from making any law —
(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes of and sections of Hindus.

[2] Article 26 states: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right –
(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

the "wording of Articles 25 and 26 establishes the primacy of public interests over religious claims and provides a wide scope for governmentally sponsored reforms,"[3] the Supreme Court has often had to adjudicate on which religious denomination or institution legally qualifies as Hindu.

I propose that the Supreme Court rulings on what does and does not qualify as Hindu are embedded in a discourse on classical or high Hinduism that originated with the nineteenth century reformation of Hinduism. For the greater part of its existence in independent India the Court appropriated this discourse about classical Hinduism to emphasize the inclusive and tolerant qualities of Hinduism as well as to advocate reform of Hinduism. Perhaps the most influential of these rulings was the Supreme Court's judgment in *Sastri Yagnapurushdasji v. Muldas Bhundardas*[4] or the Satsangi case. In this case Hinduism was memorably described as a "way of life." This understanding of Hinduism would be used in several later court rulings. But in the mid-Nineties — when the Nehruvian consensus on secularism had been severely shaken by the rise of the Hindu nationalists — the Court in the controversial 'Hindutva' ruling[5] conflated an inclusivist discourse on Hinduism with the exclusivist version of Hinduism propounded by Hindu nationalists. Though the Hindutva judgment was viewed by some as an aberration, I argue that, paradoxically, it was a product of the dominant judicial discourse on Hinduism.

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[3] Marc Galanter, *Law and Society in Modern India*, 247.
[4] AIR 1966 SC 1119.
[5] *R.Y. Prabhoo v. P.K. Kunte*, AIR 1996 SC 1113.

Genealogy of 'Hinduism'

It is now commonly accepted that use of the term 'Hinduism' or 'Hindu' to denote a single religious community is of recent origin. As historian Romila Thapar points out, "the first occurrence of the term 'Hindu' is as a geographical nomenclature."[6] The earliest mention of Hindu can be found in the inscriptions of the Achaemenid empire that refer to the frontier region of the Indus or Sindhu as 'Hi(n)dush'. Much later, Arabic texts would refer to the land across the Sindhu or Indus river as 'Al-Hind'. W.C. Smith writes, "The term hindu, and its dialectical alternative sindhu, are the Indo-Aryan word for 'river', and, as a proper noun, for the great river of the northwest of the sub-continent, still known locally as the Sindh and in the West through the Greek transliteration as 'Indus'. As a designation for the territory around that river (that is, meaning roughly, 'India') the word was used by foreigners but not internally, and indeed it (and the Persian counterpart 'Hindustan', introduced and used by Muslims) is still primarily an outsider's name for the country."[7]

It was only from the nineteenth century that the term Hinduism[8] came to be in vogue. In large measure it was introduced by British scholars, missionaries and administrators. However, as Frykenberg notes, the term Hindu was used by the British in a negative sense to "characterize all things in India (especially elements and

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[6] Romila Thapar, "Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity," *Modern Asian Studies* 23, 2 (1989), 222.

[7] Wilfred Cantwell Smith *The Meaning and End of Religion: A New Approach to the Religious Traditions of Mankind* (New York: Macmillan, 1962), 30.

[8] The Oxford English dictionary traces the first use of the term 'Hindooism' to 1829 in the *Bengalee* and also to an 1858 usage by Indologist Max Mueller. See Richard King, "Orientalism and Modern Myth of 'Hinduism'," *Numen* 46 (1999), 165. See also John Stratton Hawley, "Hinduism and the Fate of India," *Wilson Quarterly* (Summer 1991).

features found in the cultures and religions of India) which were not Muslim, not Christian, not Jewish, or, hence, not Western."[9] In this sense, as Frykenberg, as well as Heinrich von Stietencron, point out 'Hindu' merely supplanted the earlier term 'gentoo' which was used to designate heathens.[10] This meant that the multiplicity of beliefs, practices and doctrines within Hinduism was subsumed under one omnibus term. But the plurality within Hinduism continued to confound the "Western love of definition and neat pigeon-holing."[11] In fact, the narrative of Hinduism confounding outsiders has a long history: the famous medieval traveler Albiruni (973-1048) was clearly perplexed during his travels in India by the diversity among Hindus.[12] One of the reasons for this sense of confoundment was that unlike other world religions Hinduism is "not a linear progression from a founder through an organizational system."[13] Instead Hinduism can be read as a "mosaic of distinct cults, deities, sects and ideas and the adjusting, juxtaposing or distancing of these to existing ones, the placement drawing not only on belief and ideas but also on the socio-economic reality."[14] Faced with what appeared to them to be a bewildering mosaic, Western scholars often resorted to metaphors like the 'jungle' or 'sponge' to map Hinduism.[15]

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[9] Robert Eric Frykenberg, "The Emergence of Modern 'Hinduism' as a Concept and as a Institution: A Reappraisal with Special Reference to South India," in Gunther D. Sontheimer and Herman Kulke eds., *Hinduism Reconsidered* (New Delhi: Manohar Publications, 1991), 31.

[10] Heinrich von Stietencorn, "Hinduism: On the Proper Use of a Deceptive Term," in Sontheimer and Kulke eds., 13.

[11] Percival Spear, cited in Ronald Inden, *Imagining India* (Bloomington: Indiana University Press, 2000), 85.

[12] Arvind Sharma, "On Hindu, Hindustan, Hinduism and Hindutva," *Numen* 49 (2002), 7.

[13] Thapar, "Imagined Religious Communities? Ancient History and the Modern Search for a Hindu Identity," 216.

[14] Ibid., 216.

[15] See Inden, *Imagining India*, chapter 3, for the use of metaphors by Europeans to describe Hinduism.

At the same time, the British made a distinction between the living religion of the Hindus and what was characterized as a purer Vedic religion. P.J. Marshall points out from the latter half of the eighteenth century the "Europeans had begun to make the distinction, which was to have so long a life, between what they regarded as 'popular' Hinduism and 'philosophical' Hinduism. Popular cults were described to be condemned or ridiculed, but most writers were also prepared to admit the existence of metaphysical assumptions and ethical doctrines in Hinduism which they could approve because they seemed to be similar to western concepts."[16] Through the nineteenth century European scholars contributed profoundly to the modern construction of Hinduism by first "locating the core of Indian religiosity in certain Sanskrit texts" and second by defining Hinduism based upon "contemporary Western understandings of the Judeo-Christian traditions."[17]

Needless to say the fixation with defining Hinduism was not confined to the Western scholar. The definition or redefinition of Hinduism by Hindu intellectuals was most often a response to the relentless critiques of European missionaries and Orientalists. Hence, the Bengali novelist Bankimchandra Chattopadhyay (1838-1894), a crucial figure in the history of Hindu nationalism, made a fervent appeal to discover the essentials of Hinduism: "Let us rid our conception of Hinduism of this 'tangled jungle of ghosts, demons and saints', and such other articles of belief which are to be found in every country and among peoples of all creeds, and which are no more

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[16] P.J. Marshall, "Introduction," in Marshall ed., *The British Discovery of Hinduism in the Eighteenth Century* (Cambridge: Cambridge University Press, 1970), 20.
[17] King, "Orientalism and Modern Myth of 'Hinduism'," 166.

essential parts of Hinduism as they are of Christianity."[18] At the same time, the Orientalist discourses were appropriated by Indians in the nineteenth century and applied in such a way as to undercut the colonialist agenda. Thus Chattopadhyay writes, "The researches of European scholars have converted what was once unintelligible nonsense to a subject of accurate scientific study. What was hitherto unnecessary and meaningless, has now been shown to be a necessary condition of primitive culture, and full of deep signification."[19]

The search by Hindu intellectuals for a more pure form of Hinduism was initiated by Rammohun Roy (1772-1833), who is recognized as a seminal figure in the reform of Hinduism and hailed as the 'father' of modern India. Roy, who was a passionate critic of polytheism, idolatry and practices like *sati*, identified the Vedas and Upanishads as the true sources of Hinduism. He writes, "The whole body of Hindu Theology, Law, and Literature, is contained in the Veds, which are affirmed to be coeval with the creation... But from its being concealed within the dark curtain of the Sungscrit language, and the Brahmins permitting themselves alone to interpret, or even to touch any book of the kind, the Vedant, although perpetually quoted, is little known to the public: and the practice of few Hindoos indeed bears the least

[18] Bankimchandra Chattopadhyay, *Letters on Hinduism*, 10. The reference to "tangled jungle of ghosts and demons" is from Alfred Lyall's description of Hinduism in Lyall, *Asiatic Religions: Religious and Social* I (1882).

[19] Chattopadhyay, *Letters on Hinduism*, 19. At the same time, Chattopadhyay recognized that Orientalist scholars had their own prejudices. He writes, "European scholars, like Professor Max Mueller , have been very eloquent on the importance of the study of the Vedas, but their point of view is exclusively the European point of view, and fails to represent the vastly superior interest Vedic studies possess of us, natives of the country." Chattopadhyay, cited in Partha Chatterjee, *Nationalist Thought and the Colonial World* (Minneapolis: University of Minnesota Press, 1993), 60-61.

accordance with its precepts."[20] By translating the Sanskrit texts into Bengali, Roy wanted to strike a blow against those who "prefer custom and fashion to the authorities of their scriptures, and therefore continue, under the form of religious devotion, to practice a system which destroys, to the utmost degree, the natural texture of society, and prescribed crimes of the most heinous nature…"[21] In a similar vein, a generation later Chattopadhyay appealed for a reformulation of Hinduism: "It [the definition of Hinduism] will exclude, as I have advanced, much that is popularly considered to be a portion of Hinduism even by Hindus themselves… It is precisely popular delusions of this sort that have encrusted Hinduism with the rubbish of ages — with superstitions and absurdities which subvert its higher purposes; and which it is the duty of every true Hindu, actively to assail and destroy."[22]

This 'cleansing' of Hinduism and an adoption of, what Thapar has referred to as, the Semitic model would be a recurrent theme among Hindu reformers in the nineteenth century and later. According to Frykenberg, Indian reformers and leaders from Roy to Jawaharlal Nehru used the terms Hindu and Hinduism in the 'Brahminical' or 'classical' sense. Ashis Nandy et al describe the primary feature of the "new Hinduism" of the nineteenth century thus: "[I]t defensively rejected or devalued the little cultures of India as so many indices of the country's backwardness and as prime candidates for integration within the Hindu/national mainstream. Instead, the new Hindus sought to chalk out a new pan-Indian religion called Hinduism that

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[20] Bruce Carlisle Robertson ed., *The Essential Writings of Raja Rammohun Roy* (Delhi: Oxford University Press, 1999), 3.
[21] Ibid., 36-37.
[22] Chattopadhyay, *Letters on Hinduism*, 12.

would be primarily classical, Brahmanic, Vedantic and, therefore, not an embarrassment to the modern or semi-modern Indians in touch with the more 'civilized' parts of the world."[23]

The brief discussion of the genealogy of the term 'Hinduism' makes it apparent that the Supreme Court was entering into a contested terrain when it attempted to define Hinduism. As Arvind Sharma puts it in an introduction to a recent anthology on Hinduism, "The problem of defining Hinduism has been endemic in the study of Hinduism since the term Hinduism was coined and introduced early in the nineteenth century. It has, however, increasingly become more acute."[24] In the subsequent discussion of the judicial discourse on Hinduism, I intend to show that the Court assigned a critical role to many of the dominant assumptions of the reformist and neo-Hinduism in the nineteenth and early twentieth century.

At this point it might be useful to make a distinction between two strands of reformist Hinduism: an 'inclusivist' and an 'exclusivist' model. The most prominent proponents of an inclusivist Hinduism were Swami Vivekananda (1863-1902) and Sarvepalli Radhakrishnan (1888-1975). Vivekananda, the founder of the Ramakrishna Mission, probably did most to shape the discourse on Hinduism in modern India as well as popularize Hinduism in the West. Radhakrishnan, a distinguished philosopher who taught at Oxford[25] and later became President of India (1962-67), would develop

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[23] Ashis Nandy, Shikha Trivedy, Shail Mayaram, Achut Yagnik, *Creating a Nationality: The Ramjanambhumi Movement and Fear of the Self* (Delhi: Oxford University Press, 2002), 58.
[24] Arvind Sharma, "What is Hinduism?" in Arvind Sharma ed., *The Study of Hinduism* (Columbia: University of South Carolina Press, 2003), 1-2.
[25] Radhakrishnan taught Eastern religion and ethics at Oxford from 1936-52. He also held teaching and administrative positions at Calcutta University, Mysore University and Benaras Hindu University.

many of Vivekananda's ideas on Hinduism. Both of then forcefully argued for Hinduism as a universal and tolerant religion founded on the Vedas. These ideas would play a central role in the Court's understanding of Hinduism. However, I argue that the Court, by adopting the inclusivist model of Hinduism, also contributed to the construction of a homogenous Hinduism that was inimical to variations in beliefs, practices and doctrines. In this paradoxical sense the Court's understanding of Hinduism overlapped with the exclusivist strand associated with the founder of contemporary Hindu nationalism, Vinayak Damodar Savarkar (1883-1966) and his notion of 'Hindutva' (Hinduness), a strand which I will discuss at greater length below. Before turning to an analysis of the court's definition of Hinduism I will briefly outline the inclusivist and the exclusivist models of Hinduism. One must keep in mind, however, that there are significant common features in the models which contributed in part to the Court's conflation of Hinduism with Hindutva.

Inclusivist Hinduism

The Frenchman Francois Bernier, who visited India between 1656 and 1668, wrote of the pluralism of Hinduism and tolerance of the Hindus.[26] However, the conceptual framework for the inclusive model of Hinduism was laid at the end of the nineteenth century by the eminent Oxford Sanskritist Monier Monier-Williams (1819-1899).[27] In his influential book, *Religious Thought and Life in India*, Monier-Williams writes, "It

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[26] Francois Bernier, *Travels in the Mogul Empire 1656-1668* (New Delhi: Oriental Reprint, 1983).
[27] Sir Monier Monier-Williams was in 1860 elected the Boden Professor of Sanskrit at Oxford edging out Max Mueller to the prestigious post. One of Monier-William's major achievements was the establishment of the Indian Institute at Oxford.

[Hinduism] claims to the one religion of humanity, of human nature, of the entire world. It cares not to oppose the progress of any other system. For it has no difficulty in including all other religions within its all-embracing arms and ever-widening fold."[28] He describes the Hindu religion as one "based on the idea of universal receptivity" which has "first borne with and then, so to speak, swallowed digested, and assimilated something from all creeds."[29] In a more recent reformulation, the German Indologist, Paul Hacker, argued that the inclusivism (*inklusivismus*) associated with Hinduism is often confused with tolerance. According to Hacker, inclusivism "consists in claiming for, and thus including in, one's own religion what really belongs to an alien sect."[30] He points out that "it would perhaps be more accurate to speak of inclusivism in many cases where we are inclined to see Hindu tolerance."[31] Hacker singles out Vivekananda and Radhakrishnan as the most notable practitioners of this method of inclusivism. Both Vivekananda and Radhakrishnan were also the leading proponents of Advaita Vedanta.[32] Though Hacker's additional assertion that there was inclusivism rather than tolerance in Indian tradition has been contested, his claim about the displacement of tolerance by inclusivism is useful in discussing the thoughts of Vivekananda and Radhakrishnan.

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[28] Monier Monier-Williams, *Religious Thought and Life in India* (New Delhi: Oriental Books Reprint Corp, 1974), 6.
[29] Ibid., 57.
[30] Hacker, cited in Wilhelm Halbfass, *India and Europe: An Essay in Understanding* (Albany: SUNY Press, 1988), 404-5. The original essay in German appears in Hacker, "Inklusivismus," in G. Oberhammer ed., *Eine Indische Denkform* (Vienna: 1983).
[31] Halbfass, *India and Europe: An Essay in Understanding*, 405.
[32] Ibid., 408-409. See also Robert N. Minor, "Sarvepalli Radhakrishnan and 'Hinduism': Defined and Defended," in Robert Baird ed., *Religion in Modern India* (Delhi: Manohar, 1991).

Perhaps the most powerful articulation of the inclusivist model of Hinduism was Vivekananda's now legendary address at the Parliament of Religions in Chicago in 1893 where he declared: "I am proud to belong to a religion which has taught the world both tolerance and universal acceptance. We believe not only in universal toleration but we accept all religions as true."[33] This theme of the tolerance and universality of Hinduism, specifically Vedantic Hinduism, would find pride of place in several of Vivekananda's speeches. At yet another lecture in America, Vivekananda clearly outlined his idea of an inclusivist Hinduism: "Ours, as I have said, is the universal religion. It is *inclusive* enough, it is broad enough to include all ideals. All the ideals of religion that already exist in the world can be immediately included, and we can patiently wait for all the ideals that are to come in the future to be taken in the same fashion, embraced in the infinite arms of the religion of the Vedanta (italics added)."[34] Thus, the infinite capacity to accommodate differences and dissent becomes the principal feature of Hinduism.

> "[S]ect after sect arose in India and seemed to shake the religion of the Vedas to its very foundations, but like the waters of the seashore in a tremendous earthquake it receded only for a while, only to return in all-absorbing flood, a thousand times more vigorous, and when the tumult of the rush was over, these sects were all sucked in, absorbed, and assimilated into the immense body of the mother faith."[35]

According to Vivekananda, the Hindu religion was founded on the Vedas which "are a series of books which, to our minds, contain the essence of all religion."

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[33] Swami Vivekananda, *The Collected Works of Swami Vivekananda* I (Calcutta: Advaita Ashrama, 1971-73), 1.
[34] Vivekananda, *Collected Works* III, 251-52.
[35] Vivekananda, *Collected Works* I, 6.

More importantly he believed that only Vedanta could be the basis of a universal religion. "[O]ur claim is that the Vedanta only can be the universal religion, that it is already the existing universal religion in the world, because it teaches principles and not persons. No religion built upon a person can be taken up as a type by all the races of mankind... Now, the Vedantic religion does not require any such personal authority. Its sanction is the eternal nature of man, its ethics are based upon the eternal spiritual solidarity of man, already existing, already attained and not to be attained."[36]

Despite his professed openness to other religions, Vivekananda believed in the superiority of Hinduism. At a speech in Madras, he said, "Ours is the religion of which Buddhism with all its greatness is as rebel child, and of which Christianity is a very patchy imitation."[37] Harking back to the theme that Vedantic religion represented eternal truths, Vivekananda emphasized that only Hinduism had the potential of being a universal religion: "You hear claims made by every religion as being the universal religion of the world. Let me tell you in the first place that perhaps there never will be such a thing, but if there is a religion which can lay claim to be that, it is only our religion and no other, because every other religion depends on some person or persons... But the truths of our religion, although we have persons by the score, do not depend upon them."[38]

For Vivekananda, the Vedas were also the fundamental unifying force among Hindus belonging to different sects. Addressing a gathering in Lahore in 1897 Vivekananda spoke on 'The Common Bases of Hinduism': "Perhaps all who are here

[36] Vivekananda, *Collected Works* III, 250.
[37] Ibid., 275.
[38] Ibid., 279-80.

will agree on the first point that we believe the Vedas to be the eternal teachings of the secrets of religion. We all believe that this holy literature is without beginning and without end, coeval with nature, which is without beginning and without end; and that all our religious differences, all our religious struggles must end when we stand in the presence of that holy book; we are all agreed that this is the last court of appeal in all our spiritual differences."[39]

In keeping with his belief in a higher religion, Vivekananda castigated, as Tapan Raychaudhuri puts it, the "mindless imbecilities of popular Hinduism."[40] To quote once again from Vivekananda's speech in Madras, "The fact is that we have many superstitions, many bad spots and sores on our body – these have to excised, cut off, and destroyed – but these do not destroy our religion, our national life, our spirituality. Every principle of religion is safe, and the sooner these black spots are purged away, the better the principles will shine, the more gloriously."[41]

Many of Vivekananda's ideas on Hinduism, especially its capacity to assimilate, its unique role as a universal religion and the centrality of the Vedas, would be distilled by Radhakrishnan to define Hinduism as a "way of life" rather than a religion. Radhakrishnan has written how as a young student he was profoundly affected by Vivekananda and his mentor Ramakrishna Paramahansa. In the famous Upton lectures at Oxford in 1926, Radhakrishnan famously described Hinduism thus: "Hinduism is more a *way of life* than a form of thought. While it gives absolute liberty

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[39] Ibid., 372.
[40] Tapan Raychaudhuri, "Swami Vivekananda's Construction of Hinduism," in William Radice ed., *Swami Vivekananda and the Modernization of Hinduism* (Delhi: Oxford University Press, 1998), 12.
[41] Vivekananda, *Collected Works* III, 279.

in the world of thought it enjoins a strict code of practice. The theist and the atheist, the skeptic and the agnostic may all be Hindus if they accept the Hindu system of culture and life (italics added)."[42] Radhakrishnan goes on to compare Hinduism to a "fellowship" by saying, "Hinduism is not a sect but a fellowship of all who accept the law of right and earnestly seek for the truth."[43]

Radhakrishnan links the very difficulty of defining Hinduism or finding common characteristics to its ability to assimilate and absorb external influences. "The ease with which Hinduism has steadily absorbed the customs and ideas of peoples with whom it has come into contact is as great as the difficulty we feel in finding common features binding together its different forms."[44] This assimilative quality of Hinduism, according to Radhakrishnan, has enabled it to withstand the onslaught of different people and ideas that have poured into India since the earliest times. "Though peoples of different races and cultures have been pouring into India from the dawn of history, Hinduism has been able to maintain its supremacy, and even the proselytizing creeds backed by political power have not been able to coerce the large majority of Indians to their views."[45] Thus Hinduism has "come to be a tapestry of the most variegated tissues and almost endless diversity of hues."[46]

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[42] S. Radhakrishnan, *The Hindu View of Life* (New York: Macmillan, 1957), 77. Radhakrishnan makes a similar statement in the same series of lectures: "While fixed intellectual beliefs mark off one religion from another, Hinduism sets itself no such limits. Intellect is subordinated to intuition, dogma to experience, outer expression to inward realization. Religion is not the acceptance of academic abstraction or the celebration of ceremonies, but a *kind of life* or experience (italics added)." Radhakrishnan, *The Hindu View of Life*, 15.
[43] Ibid., 77.
[44] Ibid., 12.
[45] Ibid., 12-13.
[46] Ibid., 20.

For Radhakrishnan, like Vivekananda, the Vedas and Vedanta remained the spiritual core of Hinduism through its entire history of development. Though Hinduism has continued to develop and grow through the ages, it is "not to be dismissed as a mere flow and strife of opinions, for it represents a steady growth of insight, since every form of Hinduism and every stage of growth is related to the common background of the Vedanta."[47] He writes that "those parts of the new faith which are not in conformity to the Vedic Canon tend to be subordinated and gradually dropped out."[48] Again like Vivekananda, Radhakrishnan believed that in spite of the surface differences there was a fundamental unity among Hindus. The inchoate nature of Hinduism does not deter Radhakrishnan from asserting, "In spite of the fact that Hinduism has no common creed and its worship no fixed form, it has bound together multitudinous sects and devotions into a common scheme."[49]

Exclusivist Hinduism

The term 'neo-Hinduism' has been used to describe the thought and philosophy of a whole range of Hindu reformers and ideologues, including Bankimchandra Chattopadhyay, Swami Dayanand, Vivekananda, Radhakrishnan and Mohandas Gandhi. According to Paul Hacker, neo-Hinduism was characterized by an invoking of the 'Hindu tradition' in response to the encounter with the West. However, a crucial element of neo-Hinduism was a "reinterpretation" of tradition.[50] Some scholars have

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[47] Ibid., 22.
[48] Ibid., 23.
[49] Ibid., 54.
[50] Hacker, cited in Halbfass, *India and Europe: An Essay in Understanding*, 220.

argued that the differences among the neo-Hindus were marginal while others are of the view that there were fundamental differences in the ideology of the several important figures clubbed under the neo-Hindu label.[51] My view is that a broad distinction can be made between an inclusivist and an exclusivist discourse about Hinduism. At the same time the reader should keep in mind that inclusivism and exclusivism are not watertight categories.

Some of the important elements for the framework of the exclusivist formulation of Hinduism were provided by nineteenth century figures such as Dayanand (1824-1883) and Chattopadhyay. Two features of Chattopadhyay and Dayanand's work would play a significant role in Savarkar's Hindutva ideology: the idea of a Hindu *rashtra* or nation (as opposed to a religion or civilization) and the distinction between a 'Hindu' (which included Buddhists, Jains and Sikhs) and the 'Other' represented by Muslims and Christians. As several recent studies have shown Chattopadhyay was a crucial figure in the nineteenth century response to colonial rule.[52] Besides his novels like *Anandamath*, which is famous for the celebrated

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[51] For instance there are some like Ashis Nandy who believe that Dayanand, Chattopadhyay and Vivekananda had similar world views. See Ashis Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism* (New Delhi: Oxford University Press, 1992), 22-26. However, there are other scholars who believe that figures such as Vivekananda and Dayanand had fundamentally different ideas on Hinduism. See, for example, Shamita Basu, *Religious Revivalism as Nationalist Discourse: Swami Vivekananda and New Hinduism in Nineteenth Century Bengal* (New Delhi: Oxford University Press, 2002), 127: "The Swami [Vivekananda] wanted to advocate a form of Hinduism that was a far cry from the parochial version of the religion which the orthodox Hindu leadership wanted to popularize. Vivekananda followed the model of the Reformation in depoliticizing Hinduism, confining in a Lutheran manner the spiritual to the private sphere of life."

[52] See, for example, Chatterjee, *Nationalist Thought and the Colonial World*, ch.3, and Sudipta Kaviraj, *The Unhappy Consciousness: Bankimchandra Chattopadhyay and the Formation of Nationalist Discourse in India* (New Delhi: Oxford University Press, 1998).

patriotic hymn 'Bande Mataram' and its anti-Muslim rhetoric,[53] Chattopadhyay contributed significantly to laying the ideological foundations of a "national religion" based on Hindu ideals. In one of his later works, *Krsnacaritra*, Chattopadhyay sought to reinterpret Krishna as a "respectable, righteous, didactic, 'hard' god, protecting the glories of Hinduism."[54] Dayanand, on the other hand, was much more involved in the actual reform and organization of Hinduism. He believed that a regeneration of the Hindu community was possible by going back to the Vedic texts and with this in mind he founded the Arya Samaj in 1875. Daniel Gold has observed that the Samaj "presents one of the closest parallels to Western fundamentalism of all the Indian groups… a definite religious group with its own leaders, guiding texts and sacraments."[55] At the same time, Dayanand made a concerted effort to establish the superiority of Vedic Hinduism[56] vis-a-vis Islam and Christianity[57] in works like the *Satyarth Prakash*[58] as well as to mobilize Hindus around issues such as 'reconversion' (*suddhi*), cow protection and the importance for nationalism of the Hindi language.

If Chattopadhyay and Dayanand foreshadowed exclusivist Hinduism, then undoubtedly the locus classicus of this variety of Hinduism was Savarkar's *Hindutva*.

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[53] See Tanika Sarkar, "Imagining Hindurashtra: The Hindu and the Muslim in Bankim Chandra's Writings," in David Ludden ed., *Contesting the Nation: Religion, Community, and the Politics of Democracy in India* (Philadelphia: University of Pennsylvania Press, 1996).
[54] Nandy, *The Intimate Enemy: Loss and Recovery of Self Under Colonialism*, 24.
[55] Daniel Gold, "Organized Hinduism: From Vedic Truth to Hindu Nation," in Martin Marty and R.S. Appleby eds., *Fundamentalisms Observed* (Chicago: University of Chicago Press, 1991), 534.
[56] For Dayanand's relationship to the Vedas see Arvind Sharma, "Swami Dayananda Sarasvati and Vedic Authority," in Baird (ed.), *Religion in Modern India*. See also Kenneth W. Jones, *Arya Dharm: Hindu Consciousness in Nineteenth-Century Punjab* (Berkeley: University of California Press, 1976).
[57] J.T.F. Jordens, *Dayananda Saraswati: His Life and Ideas* (Delhi: Oxford University Press, 1978), 279.
[58] There are two editions of the *Satyarth Prakash* – the first edition appeared in 1875 and the second one was composed in the final years of Dayanand's life. Jordens points out that the second edition was more political and anti-British in tone.

Savarkar, who was sent to jail by the British government in 1910 for revolutionary activities, wrote *Hindutva* while in prison.[59] The treatise, which was published in 1923, was the product of a period when "the arrival of pan-Indian electoral politics had created a space for a political definition of the Hindus that could be more exclusivist."[60] Like many Hindu intellectuals before him, Savarkar, too, engaged with the problem of how to define 'Hinduism' and 'Hindu'. In tracing the origin of the term 'Hindu', Savarkar refused to accept standard interpretations that held that the term was coined by outsiders to describe the people living across the Indus river. In his seminal text, *Hindutva,* he wrote, "Thus Hindu would be the name that this land and the people that inhabited it bore from time immemorial that even the Vedic name Sindhu is but a later and secondary form of it."[61]

The key innovation by Savarkar was that "the concept of Hindu is given a predominantly territorial component, a concept of holy land is specifically introduced in a fashion that would create a stratarchy of Indians."[62] "We have found," Savarkar writes, "the first important essential qualification of a Hindu is that to him the land that extends from Sindhu to Sindhu is the Fatherland (Pitribhu), the Motherland (Matribhu) the land of his patriarchs and forefathers."[63] More importantly, Savarkar specified that the "Dharma of a Hindu being so completely identified with the land of the Hindus, this land to him is not only a Pitribhu but a Punyabhu, not only a

[59] Savarkar was released from prison in 1924 and subsequently became the president of the Hindu Mahasabha from 1937-1943. Later, he was linked to Mahatma Gandhi's assassins, Nathuram Godse and Narayan Apte, but the charges against him were never proved.

[60] Nandy et al, *Creating a Nationality: The Ramjanambhumi Movement and Fear of the Self,* 67.

[61] V.D. Savarkar, *Hindutva: Who is a Hindu?* (Bombay: Veer Savarkar Prakashan. 1969), 10.

[62] Nandy et al, *Creating a Nationality: The Ramjanambhumi Movement and Fear of the Self,* 67.

[63] Savarkar, *Hindutva: Who is a Hindu?,* 110.

fatherland but a holyland."[64] This meant that Muslims and Christians, who might have been born in the "common Fatherland", could not be regarded as Hindus: "For though Hindustan to them is Fatherland as to any other Hindu yet it is not to them a Holyland too. Their Holyland is far off in Arabia or Palestine."[65]

Savarkar coined the word 'Hindutva' to substitute for Hinduism which, in his book, "meant a theory or code more or less based on spiritual or religious dogma or system."[66] According to Savarkar it was of paramount importance to distinguish between Hinduism and Hindutva: "Hinduism is only a derivative, a fraction, a part of Hindutva… Hindutva embraces all the departments of thought and activity of the whole Being of our Hindu race."[67] Savarkar elaborated this notion by ascribing three "essentials" to Hindutva – a common nation (*rashtra*), a common race (*jati*) and a common civilization (*sanskriti*). This meant that religious belief and practice was ascribed a secondary status in Savarkar's conception of Hindutva. Hence, Chetan Bhatt observes, "The displacement of 'Hinduism' by Hindutva represented a substitutionist logic that strictly demoted religion or religious belief. This was both an essential step in his primarily non-religious, territorial and racial conception of Hindutva and its most contradictory, because at some stage, Muslims and Christians had to be excluded from the Hindu nation precisely because of Savarkar's view of the

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[64] Ibid., 111.
[65] Ibid., 113.
[66] Ibid., 4
[67] Ibid., 3-4.

radically different nature of their religion that was seen as coextensive with their identities."[68]

The exclusivist logic of Savarkar was extended by M.S. Golwalkar. He was the most prominent ideologue of the Rashtriya Swayamsevak Sangh (RSS).[69] Founded in 1925, the RSS aimed to revitalize India's cultural life by organizing branches (*sakhas*) where the country's youth could learn discipline and devotion to the nation. In 1938, two years after he became *sarsanghchalak* (supreme director) of the RSS, Golwalkar published *We or Our Nationhood Defined.* Regarding the origins of the Hindus, Golwalkar declared in his book that Hindus came "into this land [Hindusthan] from nowhere, but are indigenous children of the soil always, from times immemorial and are natural masters of the country."[70] Borrowing from extant notions of nationalism, Golwalkar stressed that the 'Hindu' nation was founded on a defined territory, race, religion, culture and language. This concept of the Hindu nation was marked by exclusivity: "All those not belonging to the national i.e. Hindu Race, Religion, Culture and Language naturally fall out of the pale of 'National' Life."[71] Golwalkar's message to the non-Hindus was unambiguous and draconian:

> The non-Hindu peoples in Hindusthan must either adopt the Hindu culture and language, must learn to respect and hold in reverence Hindu religion, must entertain no idea but those of glorification of the Hindu race and culture i.e. they must not only give up their attitude of intolerance and

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[68] Chetan Bhatt, *Hindu Nationalism: Origins, Ideologies and Modern Myths* (Oxford and New York: Berg, 2001), 85.

[69] For details about the RSS see Walter Anderson and S. Damle, *Brotherhood in Saffron* (Boulder: Westview Press, 1987) and Tapan Basu, Pradip Datta, Sumit Sarkar, Tanika Sarkar, Sambuddha Sen, *Khaki Shorts and Saffron Flags: A Critique of the Hindu Right* (New Delhi: Orient Longman, 1993), ch. 2.

[70] M.S. Golwalkar, *We or Our Nationhood Defined* (Nagpur: Bharat Prakashan, 1947), 13

[71] Ibid., 52.

> ungratefulness towards this land and its agelong traditions but must also cultivate the positive attitude of love and devotion instead — in one word they, must cease to be foreigners, or may stay in the country wholly subordinated to the Hindu nation, claiming nothing, deserving no privileges, far less any preferential treatment – not even citizens' rights.[72]

In keeping with this line of thinking, Golwalkar made an ominous reference to the example of Nazi Germany and how it had shown that it was impossible "for Races and cultures, having differences to the root, to be assimilated into one united whole, a good lesson for use in Hindusthan to learn and profit by."[73]

Balraj Madhok[74] is a figure of the next generation of Hindu nationalism. His interpretation of Hindutva is constructed as a leader of the Bharatiya Jan Sangh party. Madhok was motivated by a desire to widen the appeal of Hindutva. His thinking is affected by post-nationalist, post-independence electoral and party competition. The Jan Sangh,[75] which was the predecessor to the Bharatiya Janata Party (BJP), was founded in 1951. Madhok made an effort to downplay Hindutva and to highlight the term 'Bharatiya', a Sanskrit word for Indian. He wrote, "At the same time there is no sense in making a fetish of the word Hindu. Instead of forcing it on those who do not like it today, it should be popularized as a synonym of 'Bharatiya' in writing and speaking."[76] However, he was clear that by the Indian nation he meant Hindu *rashtra*. But at the same time he took a more accommodating approach than Savarkar or

[72] Ibid., 55-56.
[73] Ibid., 43.
[74] Madhok, a former president of Jan Sangh, quit the party in 1973 after a bitter power struggle.
[75] For a history of the Jan Sangh, see Bruce Graham, *Hindu Nationalism and Indian Politics: The Origins and Development of the Bharatiya Jana Sangh* (Cambridge: Cambridge University Press, 1990).
[76] Balraj Madhok, *Indian Nationalism* (New Delhi: Bharatiya Sahitya Sadan, 1969), 96.

Golwalkar by stressing that "Christians and Muslims living in India are also Hindus if India and Indian culture commands their first and foremost allegiance."[77] According to Arvind Sharma, this signaled a subtle shift in the understanding of Hindutva: "During the period when the Jan Sangh functioned as a party [1951-1979], the concept of Hindutva underwent an ideological shift. It took the form of identifying India with Hindutva, rather than Hindutva with India."[78] Now that the reader has been introduced to the discourse and discursive formations with respect to Hindu, Hinduism, Hindutva and Hindu *rashtra*, the analysis can move on to the Court's definition and understanding of Hinduism.

The Satsangi Case

The first case in independent India in which the Supreme Court famously attempted to define Hinduism was *Yagnapurushdasji v. Muldas.*[79] The 1966 case involved the Satsangis or followers of Swaminarayan (1780-1830) who claimed that their temples did not fall under the jurisdiction of the Bombay Harijan Temple Entry Act, 1948. The Act provided that every Hindu temple shall be open to Harijans or untouchables. By the time the case reached the Supreme Court via a trial court and the Bombay High Court, the Central Untouchability (Offences) Act of 1955 had already come into effect. The case made by the Satsangis was that the "Swaminarayan sect represents a

[77] Ibid., 96.
[78] Sharma, "On Hindu, Hindustan, Hinduism and Hindutva," 24.
[79] AIR 1966 SC 1119. For a close reading of the case see Galanter, *Law and Society in Modern India*, ch. 10.

distinct and separate religious sect unconnected with the Hindus and Hindu religion, and as such, their temples were outside the purview of the said Act."[80]

The Satsangis claimed separate status on four grounds. First, they argued that Swaminarayan, the founder of the sect, considered himself as Supreme God. Second, it was urged that the Satsangi temples could not be regarded as Hindu temples since they were used to worship Swaminarayan and not any traditional Hindu deity. Third, it was pointed out that the Satsangis propagated the idea that worship of any god other than Swaminarayan was a betrayal of faith. Finally, it was contended that there was a procedure of initiation (*diksha*) into the Swaminarayan sect by which a devotee assumed a distinct and separate identity.

The Court rejected the contention of the Satsangis relying primarily on a description of their religious practices by Monier-Williams in his *Religious Thought and Life in India*. Based on its reading of Monier-Williams and reports of the Gazetteer of the Bombay Presidency, the Court concluded: "In our opinion, the plea raised by the appellants that the Satsangis who follow the Swaminarayan sect form a separate and distinct community different from the Hindu community and their religion is a distinct and separate religion different from Hindu religion is entirely misconceived."[81]

However, the examination of the religious practices of the Satsangis was somewhat incidental in the Court's ruling. *Yagnapurushdasji* was far more critical for the Supreme Court's construction of Hinduism, a construction that has since become

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[80] *Yagnapurushdasji* at 1121.
[81] Ibid.,1134.

hegemonic in judicial discourse. Writing for the Court, Chief Justice P.B. Gajendragadkar — who had already authored some of the most important judgements on the question of freedom of religion — proceeded to enquire "what are the distinctive features of Hindu religion."[82] At the same time, he admitted that the question "appears to be somewhat inappropriate within the limits of judicial enquiry in a court of law",[83] but he did not allow that thought to deter him. Drawing primarily from English language sources, the Court put forward the view that Hinduism was "impossible" to define: "When we think of the Hindu religion, we find it difficult, if not impossible, to define Hindu religion or even adequately describe it. Unlike other religions in the world, the Hindu religion does not claim any one God; it does not subscribe to any one dogma; it does not believe in one philosophic concept; it does not follow any one set of religious rites." Confronted with this amorphous entity, the Court concluded, "[I]t [Hinduism] does not appear to satisfy the narrow traditional features of any religion or creed. It may broadly be described as a *way of life* and nothing more (italics added)."[84]

Once the civilizational or cultural view of Hinduism was posited it was not difficult for the Court to construct an all-encompassing version of Hinduism that included a variety of creeds and sects. Hence, any reform movements, including Buddhism, Jainism and Sikhism, were seen as merely different sects within Hinduism.

> The development of Hindu religion and philosophy shows that from time to time saints and religious reformers attempted to remove from the Hindu thought elements of corruption and superstition and that led to the formation

[82] Ibid., 1127.
[83] Ibid., 1128.
[84] Ibid., 1128.

> of different sects. Buddha started Buddhism; Mahavir started Jainism; Basava became the founder of Lingayat religion, Dhyaneshwar and Tukaram initiated the Varakari cult; Guru Nanak inspired Sikhism; Dayananda founded Arya Samaj, and Chaitanya began Bhakti cult; and as a result of Ramakrishna and Vivekananda, Hindu religion flowered into its most attractive, progressive and dynamic forms. If we study the teachings of these saints and religious reformers, we would notice an amount of divergence in their respective views: but underneath that divergence, there is a kind of subtle indescribable unity which keeps them within the sweep of the broad and progressive Hindu religion.[85]

Gajendragadkar's view is, in fact, enshrined in the Constitution where Explanation II appended to Article 25 says that the "reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion." It is noteworthy that the Court could well have decided *Yagnapurushdasji* without going into a detailed exegesis of Hinduism. As Marc Galanter has pointed out in his analysis of *Yagnapurushdasji*, the Court could have decided the case with reference to Article 25(2)(b) of the Constitution, which empowers the state to overcome caste and denominational barriers within Hinduism.[86] In any case in an earlier judgment the Court had said temple-entry acts prevail over denominational claims to exclude outsiders.[87]

In *Yagnapurushdasji*, the Court used a variety of sources to define Hinduism. Robert Baird describes the Court's reasoning thus: "All of the authorities to whom appeal is made stress the wide range of Hindu belief and practice. That which had been the obstacle to constructing a model of Hinduism which would fit the concrete

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[85] *Yagnapurushdasji* at 1130.
[86] Galanter, *Law and Society in Modern India*, 247.
[87] *Venkatramana Devaru v. State of Mysore*, AIR 1958 SC 255.

data is turned into one of its major characteristics — it is inclusive."[88] Radhakrishnan in particular plays a crucial role in shaping the Court's conception of Hinduism.

At the outset, Gajendragadkar quotes a question posed by Radhakrishnan to get at a definition of Hinduism: "[T]o many Hinduism seems to be a name without any content. Is it a museum of beliefs, a medley of rites, or a mere map, a geographical expression?"[89] To this question, the Court offers a geographical solution provided by Radhakrishnan. "The Hindu civilization is so called since its original founders or earliest followers occupied the territory drained by the Sindhu (the Indus) river system corresponding to the North-West Frontier Province and the Punjab."[90] According to the Court, Radhakrishnan's definition of Hindu implied residence in a well-defined geographical area. "Aboriginal tribes, savage and half-civilized people, the cultured Dravidians and the Vedic Aryans were all Hindus as they were the sons of the same mother."[91]

The next step in the Court's construction of Hinduism is the stress on its assimilative and tolerant character, a dominant idea in Radhakrishnan's conception of Hinduism: "Naturally enough it was realized by Hindu religion that from the very beginning of its career that truth was many-sided and different views contained different aspects of truth which no one could fully express. This knowledge inevitably bred a spirit of tolerance and willingness to understand and appreciate the opponent's

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[88] Robert D. Baird, "On Defining 'Hinduism' as a Religious and Legal Category," in Baird ed., *Religion and Law in Independent India* (New Delhi: Manohar, 1993), 50.
[89] *Yagnapurushdasji* at 1128.
[90] Ibid., 1128.
[91] Ibid., 1128.

point of view."[92] The Court also mentions Monier-William's passage on Hinduism's ability to assimilate "something from all creeds,"[93] which has been cited earlier.

In formulating this overarching, all-embracing Hinduism, the Court privileges another of Radhakrishnan's major ideas: the "acceptance of the Vedas as sole foundation of the Hindu philosophy." Thus Gajendragadkar writes, "Beneath the diversity of philosophic thoughts, concepts and ideas expressed by Hindu philosophers... lie certain broad concepts which can be treated as basic. The first among these basic concepts is the acceptance of the Veda as the highest authority in religious and philosophic matters."[94] The Court even comes up with a working definition of Hinduism as formulated by B.G. Tilak: "Acceptance of the Vedas with reverence; recognition of the fact that the means to salvation are diverse; and realization of the truth that the number of gods to be worshipped is large, that indeed is the distinguishing feature of Hindu religion."[95]

The importance of *Yagnapurushdasji* was that the Court was interpreting Hinduism as an inclusivist religion drawing heavily from the ideas of Radhakrishnan and his intellectual predecessors. In this sort of usage, as noted earlier, certain features of Hinduism are most important: tolerance, universality, a classical core and a search for a fundamental unity. The Court's views on Hinduism and its inclusive nature recurred in subsequent judgements. In several important later judgements, the Supreme Court relied on the construction of Hinduism as elaborated in

[92] Ibid., 1129.
[93] Ibid., 1129.
[94] Ibid., 1130.
[95] Ibid., 1131.

Yagnapurushdasji. For instance, in *Ganpat v. Returning Officer* the Court declares: "[I]t is necessary to remember that Hinduism is a very broad based religion. In fact some people take the view that it is not a religion at all on the ground that there is no founder and no one sacred book for the Hindus. This, of course, is a very narrow view merely based on the comparison between Hinduism on the one side and Islam and Christianity on the other. But one knows that Hinduism through the ages has absorbed or accommodated many different practices, religious as well as secular, and also different faiths."[96]

The inclusive model of Hinduism has also been used to determine who qualifies as a Hindu for legal purposes. As Baird notes with respect to the application of personal law, the Court has held that the Jains,[97] who consider themselves distinct from Hinduism, and the Lingayats,[98] a 'lower caste' within Hinduism, would be treated as Hindus. Since *Yagnapurushdasji*, claims put forward by different Hindu sects to be regarded as a separate religion have not found favor with the Court. Among the more prominent cases was the denial of the status of a separate religion status to the Arya Samaj[99] and Ramakrishna Mission.[100] Let us briefly examine the Ramakrishna Mission case which was interesting for two reasons: first the Calcutta High Court accepted the claim of the Mission to be a separate religion, but the Supreme Court eventually reversed the decision; and second, the Mission's argument was that Hinduism did not qualify as a universal religion. Unlike the Satsangi case,

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[96] AIR 1975 SC 423.
[97] *Shuganchand v. Prakash Chand*, AIR 1967 SC 506.
[98] *Guramma v. Mallappa*, AIR 1964 SC 520.
[99] *D.A.V. College, Batinda v. State of Punjab*, AIR 1971 SC 1731.
[100] *Bramchari Sidheshwar Shai v. State of West Bengal*, AIR 1995 SC 2089.

where the entry into temples was at stake, the Ramakrishna Mission case revolved around the limits of state action with regard to institutions run by the Mission. In settling the case, the Court was forced to examine the doctrinal content of Ramakrishna and Vivekananda's teachings to decide whether their followers could be classified as Hindus.

Ramakrishna Mission Case

In the Ramakrishna Mission (RKM) case the issue at hand was the West Bengal government's right to interfere in the administration of and appointment of teachers to in educational institutions run by the RKM. When the case first came up for hearing before a single judge of the Calcutta High Court and subsequently before a division bench,[101] the lawyers representing RKM argued that 'Ramakrishnaism' was a minority religion and hence covered by Article 30,[102] which guarantees minorities control over educational institutions. In fact, the lawyers turned around the Court's model of inclusivism elaborated in *Yagnapurushdasji* and argued that 'Ramakrishnaism' was a "world religion" while Hinduism was not.

> The cult or religion of Shri Ramakrishna Paramahansadeb is that all beings are the manifestations of God and all religions are but different paths of reaching God... There is no necessity of one surrendering his own religion, be he a Hindu or a Christian or Muslim or Jew in order to be a follower of the cult or religion of Shri Ramakrishna... Thus in fact, Thakur Shri

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[101] For an analysis of how the Calcutta High Court dealt with the case, see Brian K. Smith, "How Not to be a Hindu: The Case of the Ramakrishna Mission," in Baird, *Religion and Law in Independent India.*
[102] Article 30 reads: (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

> Ramakrishna preached a World Religion which is quite different from all other religions.[103]

The argument by the RKM lawyers was that Ramakrishna founded a "universal" religion which was "meant not for the members of any particular caste, creed or religion but for the entire mankind."[104]

The RKM lawyers pointed to the life of Ramakrishna and his famed experimentation with different religions as the prime example of his universal beliefs: "Sri Ramakrishna practiced Hinduism and particularly Bhakti Yoga — the Path of Love. He, however, did not stop there and instead of confining himself within Hinduism and experimenting with other paths according to the tenets of Hinduism, embarked upon altogether novel experiments in accordance with the principles of other religions."[105] Thus Ramakrishna for a brief period "practiced Islam as a devout Muslim" and had visions of Christ when he went into a trance.

Contrary to the Satsangi ruling, the Calcutta High Court agreed that as compared to Hinduism Ramakrishnaism was far more inclusive and labeled it as a "Religion Universal." The Court declared, "In order to be a follower of Sri Ramakrishna, non-Hindus are not required to embrace Hinduism and to undergo *Suddhi* or other form of purification. He could continue to profess and practice his own religion and at the same time be a follower of Sri Ramakrishna's faith."[106] Contrasting 'Ramakrishnaism' with Hinduism, the Court said: "Hindu religion does

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[103] 2 Calcutta L.J. (1983), 348
[104] Cited in Smith, "How Not to be a Hindu: The Case of the Ramakrishna Mission," 342.
[105] Ibid., 342.
[106] 1 Calcutta L.J. (1986), 151.

never admit any person professing another faith and religion such as Muslim, Christian or Buddhism etc. in it unless such person gives up his religion to embrace Hinduism."[107] However, a follower of Ramakrishna is catholic in his beliefs: "A traditional Hindu claims to be a Hindu and Hindu only, and believes in the Vedas only, and not in the scriptures of any other religion;... But a follower of the cult or religion of Shri Ramakrishna, coming originally from the Hindu fold, though a Hindu, claims to be something more at the same time. As a follower of Shri Ramakrishna's Religion Universal, along with the Vedas, he accepts also the Holy Koran, the Holy Bible and all other religious scriptures to be true."[108] Further, the Court contended that Ramakrishnaites reject an "integral part of Hindu religion" — the caste system.[109]

In light of the Satsangi ruling and specifically Gajendragadkar's mention of Ramakrishna and Vivekananda as reformers working within the ambit of Hinduism, there was every chance that the Calcutta High Court judgment would be appealed in the Supreme Court. Indeed 10 years after the high court ruling, the Supreme Court overturned the ruling. In an article written well before the Supreme Court judgment Baird correctly predicted: "The inclusive model of Hinduism utilized in the Satsangi and succeeding cases could have accommodated the followers of Ramakrishna as well. But, in the interests of preserving the religious control of the College, the Calcutta High Court modified that model so that the Ramakrishnaites became

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[107] 2 Calcutta L.J. 348.
[108] Ibid., 337.
[109] Ibid., 394.

distinct… But in the light of Supreme Court statements on Hinduism as a religious category it is difficult to see the Supreme Court affirming this decision."[110]

Not surprisingly, the Supreme Court based its decision on *Yagnapurushdasji* and the "features of Hindu religion" outlined by the earlier ruling. After quoting copiously from *Yagnapurushdasji*, the Court opined that the Calcutta High Court rulings "directly conflict with the aforementioned views of the Constitution Bench of Hindu religion in the case of Yagnapurushdasji Shastri."[111] The Court also referred to the opinions of Vivekananda and writings on Ramakrishna to conclude that they were not founders of a separate religion.

> Thus, from what is said of Ramakrishna and Swami Vivekananda and of their religion by great world thinkers and philosophers, the glory of Ramakrishna is that he preached and made his principal disciple Swami Vivekananda to preach the religion of the Vedanta which is the religion of the Hindus…[112]

However, the Court did accept that RKM could be "regarded as a religious denomination within Hindu religion"[113] and could claim the fundamental rights guaranteed by Article 26. Thus, the Ramakrishna Mission case is a clear example that given the inclusivist model of Hinduism outlined in *Yagnapurushdasji* it is virtually impossible for any religious sect to seek exit. Just as the RKM was accorded the status of a denomination within Hinduism, so also other sects such as the Arya Samaj or the Ananda Margis have successfully fought for the right to be recognized as a denomination. But the status of a minority religion has been denied in all cases.

[110] Baird, *Religion and Law in Independent India*, 8.
[111] *Bramchari* at 2099.
[112] *Bramchari* at 2103.
[113] *Bramchari* at 2107.

The Hindutva Ruling

The 'Hindutva judgements' is the collective name given to seven decisions handed down by the Supreme Court in 1996. The cases involved 12 members of Hindu nationalist parties such as the Bharatiya Janata Party and Shiv Sena. The 12 members, which included Shiv Sena chief Bal Thackeray and then Maharashtra chief minister Manohar Joshi, were charged with violating section 123 of the Representation of People Act, 1951 (RPA) by appealing to Hindutva. Section 123(3) [114] prohibits election candidates from appealing for votes on the grounds of religion or religious symbols among other things. Section 123(3A) prohibits attempts to promote enmity on grounds of religion, race, community or language. On the specific question of whether an appeal to Hindutva constitutes a violation of the RPA, the main opinion of the Court was delivered in *Prabhoo v. Kunte*[115] where Ramesh Yeshwant Prabhoo, then mayor of Bombay, and his election agent, Thackeray, faced charges of a corrupt practice i.e. appealing for votes on religious grounds or promoting enmity on religious grounds.

The Court first dealt with the question of the constitutionality of section 123 of the RPA, which was challenged by the appellants. The Court upheld the constitutionality of the relevant sections of the RPA on the grounds that they were

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[114] Section 123(3) of the RPA says: "The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate."

[115] See Barbara Cossman and Ratna Kapur, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law* (New Delhi: Oxford University Press, 1999), chapter 2, for details on the Hindutva cases.

"enacted to so as to eliminate from the electoral process, appeals to those divisive factors which arouse irrational passions that run counter to the basic tenets of our Constitution, and, indeed of any civilized political and social order."[116] Writing for the Court, Justice J.S. Verma said: "Under the guise of protecting your own religions, culture or creed you cannot embark on personal attacks on those of others or whip up low hard instincts and animosities or irrational fears between groups to secure electoral victories."[117]

On the basis of speeches by Thackeray,[118] the Court held that there was an appeal to voters to elect Prabhoo because he was a Hindu. The Court also held that one of Thackeray's speeches included derogatory references to Muslims. On these counts, the Court concluded that Prabhoo and Thackeray were guilty of corrupt practices.[119] However, the most important aspect of the ruling was the discussion on the legitimacy of appealing to 'Hindutva' during the election campaign. In discussing Hindutva, Justice Verma first went over the definition of Hinduism presented in *Yagnapurushdasji*. Basing his opinion on his reading of the inclusivist Hinduism of *Yagnapurushdasji* and on another later decision,[120] Verma proceeded to conflate

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[116] *Prabhoo* at 1124.
[117] Ibid., 1124.
[118] Some of Thackeray's speeches, which were quoted by the Court, included passages like: "We are fighting this election for the protection of Hinduism. Therefore, we do not care for the votes of Muslims. The country belongs to Hindus and will remain so."
[119] In contrast, in another of the Hindutva cases, then Maharashtra chief minister Manohar Joshi was found not guilty for declaring in a public speech that the "first Hindu state will be established in Maharashtra." The Court ruled: "In our opinion, a mere statement that the first Hindu state will be established in Maharashtra is by itself not an appeal for votes on the grounds of his religion but the expression, at best, of such a hope."
[120] *Commissioner of Wealth Tax, Madras v. Late R. Stridharan by L.R.s*, (1976) Supp SCR 478. Here the Court said: "It is a matter of common knowledge that Hinduism embraces within self [sic] so many

Hindutva with Hinduism by arguing that Hindutva was a "way of life" and could not be equated with "narrow fundamentalist Hindu religious bigotry."[121]

> Thus, it cannot be doubted, particularly in view of the Constitution Bench decisions of this Court that the words 'Hinduism' and 'Hindutva' are not necessarily to be understood and construed narrowly, confined only to the strict Hindu religious practices unrelated to the culture and ethos of the people of India, depicting the *way of life* of the Indian people. Unless the context of a speech indicates a contrary meaning or use, in the abstract these terms are indicative more of a *way of life* of the Indian people and are not confined merely to describe persons practicing the Hindu religion as a faith (italics added).[122]

In conflating Hindutva with Hinduism, the Court ignored the sacred soil and birth/race aspects of Hindutva as defined by Savarkar and Golwalkar.

The Court, however, did not stop at that. Quoting from an obscure book on Indian Muslims,[123] Verma then went on to opine that "the word 'Hindutva' is used and understood as a synonym for 'Indianisation', i.e. development of uniform culture by obliterating the differences between all the cultures co-existing in the country."[124] According to the Court, the terms Hinduism and Hindutva by themselves did not violate the provisions of the RPA. "Considering the terms 'Hinduism' or 'Hindutva'

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diverse forms of beliefs, faiths, practices and worship it is difficult to define the term 'Hindu' with precision."

[121] *Prabhoo* at 1130.

[122] Ibid., 1129.

[123] Maulana Wahiuddin Khan, *Indian Muslims: The Need for a Positive Outlook* (New Delhi: 1994). The exact quote was: "The strategy worked out to solve the minorities problem was, although differently worded, that of Hindutva or Indianisation. This strategy, briefly stated, aims at developing a uniform culture by obliterating the differences between all the cultures co-existing in the country." However Cossman and Kapur point out that it is a cause of concern that the quoted passage is a description of the strategy of the Jana Sangh, which is something that the Court does not mention or seems to be bothered about. See also A.G. Noorani, *Savarkar and Hindutva: The Godse Connection* (New Delhi: LeftWord Books, 2002), 74. Noorani writes that the Maulana was not writing in praise of Hindutva but censuring it.

[124] *Prabhoo* at 1130.

per se as depicting hostility, enmity or intolerance towards other religious faiths or professions, proceeds from an improper appreciation and perception of the true meaning of these expression emerging from the discussions in earlier authorities of this Court… It is indeed very unfortunate, if in spite of the liberal and tolerant features of Hinduism recognized in judicial decisions, these terms are misused by anyone during the elections to gain any unfair political advantage."[125] But unfortunately, these terms could be and arguably were misused in the way specified.

For the Court, the context in which the terms Hinduism and Hindutva were being used and to what end were very important. Thus Verma wrote, "It is the kind of use made of these words and the meaning sought to be conveyed in the speech which has to be seen and unless such a construction leads to the conclusion that these words were used to appeal for the votes for a Hindu candidate because he is not a Hindu or not to vote for a candidate because he is not a Hindu, the mere fact that these words are used in the speech would not bring it within the prohibition of subsection (3) or (3A) of Section 123."[126]

Though Verma assimilated Hinduism and Hindutva, he was silent on the antecedents of Hindutva. For example, he did not consider Savarkar and Golwalkar's use of sacred soil and race to include some and exclude others as foreigners. However, the intense debate generated by the Hindutva judgment brought out some of the important ramifications of the ruling. Commentators were troubled by the fact that the Court by inferring the meaning of Hindutva from Hinduism had "obscured the

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[125] *Prabhoo* at 1131.
[126] Ibid., 1131-2.

historical background as well as the contemporary political context"[127] of Hindutva. It was argued that the Court failed to "recognize that Hindutva as an expression has a special meaning and is associated with the social and political philosophy of Savarkar and Golwalkar." [128] It was further pointed out that the judgment implied that "Hinduism, the religion of the majority of Indians, comes to reflect the way of life of *all* Indians."[129]

At the other end of the spectrum, the Hindu nationalists were jubilant. Soon after *Prabhoo*, an editorial in the *Organiser*, the journal of the RSS, stated, "The apex court has fully and unambiguously endorsed the concept of Hindutva which the [BJP] has been propounding since its inception."[130] The BJP referred to the judgment in the party's 1999 election manifesto: "Every effort to characterize Hindutva as a sectarian or exclusive idea has failed as the people of India have repeatedly rejected such a view and the Supreme Court, too, finally, endorsed the true meaning and content of Hinduism as being consistent with the true meaning and definition of secularism."

Much of the debate around the Hindutva ruling centered on the Court's role in conferring legitimacy on the use of Hindutva in the public sphere. There was also some discussion on what the judgment, and indeed legislation like the RPA, meant for the Indian model of secularism. For instance, Pratap Bhanu Mehta believes that both the Hindu nationalists and their critics were united in their fear of religion as a "site of

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[127] Cossman and Kapur, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law*, 34.
[128] Anil Nauriya, "The Hindutva Judgements: A Warning Signal," *Economic and Political Weekly*, 10, January (1996), 11.
[129] Cossman and Kapur, *Secularism's Last Sigh? Hindutva and the (Mis)Rule of Law*, 33.
[130] *Organiser*, Editorial, December 24 (1996)

destructive passion."[131] Mehta points out, "It seems that in India both 'secular' and 'non-secular' share the fear of unregulated religious exchange… and both have no compunctions in giving the state powers to regulate religious speech."[132] Taking a different line, Gary Jacobsohn argues that for Verma secularism means "equal treatment under the law" and that this is more "consistent with familiar Western norms of liberal democracy."[133] I do not wish to enter into this debate but rather examine the Court's conflation of Hinduism with Hindutva, which was one of the striking aspects of *Prabhoo*. In the next section, I look at how it was possible for the Court to appropriate the 'inclusivist' Hinduism of *Yagnapurushdasji* to justify the 'exclusivist' Hinduism as exemplified by Savarkar's Hindutva.

Hinduism and Hindutva

The conflation of Hinduism with Hindutva in *Prabhoo* hinged on the crucial use of the "way of life" metaphor. It is, therefore, appropriate to see how this metaphor bridges the inclusivist and exclusivist discourses on Hinduism. As indicated earlier, Radhakrishnan was a key figure in describing Hinduism as a "way of life" rather than a religion based on dogma. In *Yagnapurushdasji*, Gajendragadkar drew on Radhakrishnan's writings to describe Hinduism as a "way of life." It is interesting to note that around the same time as *Yagnapurushdasji*, the connection between

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[131] Pratap Bhanu Mehta, "Passion and Constraint," *Seminar*, 521, January (2003), 57.
[132] Ibid., 57.
[133] Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (New Delhi: Oxford University Press, 2003), 208. It must be noted that Jacobsohn is commenting on Verma's entire record in the Supreme Court, which included the Ayodhya and Bommai judgements.

Hindutva and a "way of life" was already being made. In a book published in 1969, Balraj Madhok uses the "way of life" metaphor to put forward the view that it is "wrong to talk of Hinduism as a religion in the sense in which Islam and Christianity are religions." Why is this so? Taking the cue from Radhakrishnan, Madhok writes, "Hinduism is not a very happy expression because it creates confusion in the people's minds about the word Hindu. It creates the impression of its being a creed or religion, a particular dogma and form of worship, which it is not. It comprehends (sic) within itself all the forms of worship prevalent in India which do not interfere with the worshipper's loyalty to India, her culture and tradition, history and great men."[134] While Madhok uses Radhakrishnan's all-inclusive definition of Hinduism as a religion without "any dogmatic creed," he also adds a clause of "loyalty" to the Hindu *rashtra*. In a later work, Madhok again takes recourse to Radhakrishnan to explicitly make a connection between Hindutva and a "way of life" and also employ Hinduism and Hindutva as interchangeable categories: "Hinduism or Hindutva represents a specific way of life and a cultural tradition in which different beliefs and thoughts have been flourishing and co-existing side by side since the dawn of history."[135]

The shift from the inclusivist to the exclusivist discourse, as executed by Justice Verma and by Madhok, is possible because at the heart of both the discourses lies a project to homogenize Hinduism and deprive it of its plural character. This is quite apparent in Savarkar's formulation of Hindutva. One of the fundamental principles of Hindutva was to give it a much broader scope than Hinduism, which

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[134] Madhok, *Indian Nationalism,* 95.
[135] Madhok, *Rationale of Hindu State* (Delhi: Indian Book Gallery, 1982), 8.

Savarkar saw as religious or spiritual dogma. A major concern of Savarkar in formulating the concept of Hindutva "was to avoid the political fall-out of an excessively narrow definition of Hinduism."[136] As Savarkar writes in *Hindutva*, "This is Hindudharma – the conclusion of the conclusions arrived at by harmonizing the detailed experience of all the schools of religious thought – Vaidik, Sanatani, Jain, Baudda (sic), Sikha or Devasamji. Each one and every one of these systems or sects which are the direct descendants and developments of the religious beliefs, Vaidik and non-Vaidik, that obtained in the land of the saptasindhus or in the other unrecorded communities in other parts of India in the Vedic period, belongs to and is an integral part of Hindudharma."[137] Tapan Basu et al point out with regard to Hindutva: "Exclusion, however, goes along with a supreme internal catholicity. All differences of ritual, belief, and caste are irrelevant: what matters is not content but origin in (a vaguely and arbitrarily defined) *Bharatvarsha*. Monists, monotheists, polytheists and atheists, Sikhs, Arya Samajists, and advocates of Sanatan Dharma, are all equally good Hindus for Savarkar."[138]

The Indian Constitution and the Hindu Code Bill (which comprises of four different Acts), too, take an undifferentiated view of Hinduism: it includes anyone who is *not* a Muslim, Christian, Parsi or Jew under 'Hindu' as a legal category.[139]

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[136] Sharma, "On Hindu, Hindustan, Hinduism and Hindutva," 22.
[137] Savarkar, *Hindutva: Who is a Hindu?*, 108-9.
[138] Basu et al, *Khaki Shorts and Saffron Flags: A Critique of the Hindu Right*, 9.
[139] Explanation II appended to Article 25 includes Sikhs Jains and Buddhists as Hindus. The Hindu Succession Act of 1956, for instance, applies to: (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat, or a follower of the Brahmo, Prathana or Arya Samaj.
(b) to any person who is a Buddhist, Jain or Sikh by religion; and

Arvind Sharma notes that the "Indian government, both in the language of the Indian Constitution adopted in 1950, and subsequent legislation, has virtually adopted the Hindutva definition of a Hindu — as one who belongs to any religion of Indian origin."[140] At one level, it could be argued, that the Court with its inclusive model was merely reinforcing the Constitutional (and legislative) view of Hinduism. But the Court — with the Hindutva ruling — goes beyond the Constitutional stipulation and uses the inclusive model to identify Hinduism (and Hindutva as well) with "Indianisation" and development of a "uniform culture."

The Court could make the argument about a "uniform culture" because there is an implicit case for uniformity and homogenization in the inclusivist model of Hinduism. Hacker identifies "a peculiar mixture of doctrinal tolerance and intolerance" as a crucial aspect of neo-Hindu thought. Thus the inclusivism of the neo-Hindus can be characterized as appropriation of differences rather than recognition of differences. This "intolerance" to difference is very much a part of the judicial discourse and is best captured by Gajendragadkar's summing up of *Yagnapurushdasji*: "It may be conceded that the genesis of the suit is the genuine apprehension entertained by the appellants, but as often happens in these matters the said apprehension is founded on superstition, ignorance and complete misunderstanding of

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(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any other custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed. On this point also see Baird, *Religion and Law in Independent India*, 43-44.

[140] Sharma, "On Hindu, Hindustan, Hinduism and Hindutva," 24.

the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself."[141]

This aversion to "superstition" and popular practices and a search for the "true teachings" of Hinduism is an important element in the thinking of most Hindu reformers starting from Rammohun Roy in the early nineteenth century. Radhakrishnan unequivocally states, "In the name of toleration we have carefully protected superstitious rites and customs."[142] Though he argues that Hinduism's method of assimilation is "essentially democratic,"[143] there is a hierarchical structure determining the entire process: "Every God accepted by Hinduism is elevated and ultimately identified with the central Reality which is one with the deeper self of man… Hinduism absorbs everything that enters into it, magic or animism, and raises it to a higher level."[144] The "central reality" of Hinduism is represented by the Vedas which Radhakrishnan (and indeed many of the earlier Hindu reformers) believe is the "basis of Hindu religion." [145] Because of the Vedic core of Hinduism, Radhakrishnan could assert that "differences among the sects of Hindus are more or less on the surface" and that the Hindus "as such remain a distinct cultural unit, with a common history, a common literature and a common civilization."[146] In a similar vein, Gajendragadkar finds a "subtle indescribable unity" within the "divergence" of Hinduism. In the Court's definition of Hinduism in *Yagnapurushdasji*, too,

[141] *Yagnapurushdasji* at1135.
[142] Radhakrishnan, *The Hindu View of Life,* 33.
[143] Ibid.,, 42.
[144] Ibid., 46.
[145] Radhakrishnan, *Religion and Society* (London: Allen and Unwin, 1947), 109.
[146] Radhakrishnan, *The Hindu View of Life*, 4.

"acceptance of the Vedas" is a key element. The appeal to the Vedas is convenient because the "Vedic texts contain no Hindu dogma, no basis for a 'creed' of Hinduism, no clear guidelines for the 'Hindu way of life'."[147] It is precisely the open-endedness of the Vedic texts which make them the perfect ally of Hindu reformers as well as the Court in their quest to construct a more homogenized and rational Hinduism.

Conclusion

It can be argued that the convergence of the inclusivist and exclusivist discourses on interpreting Hinduism as a "way or life" and on the project of homogenizing Hinduism is a possible explanation for the Court's conflation of Hinduism and Hindutva. However, it is also vitally important to note that this homogenization of Hinduism was inspired by fundamentally different visions. In the case of Radhakrishnan, regeneration of Hinduism — in his words placing "the whole Hindu population on a higher spiritual plane"[148] — was his primary goal. Similarly Gajendragadkar was interested in changes in the "whole social and religious outlook of the Hindu community."[149] In contrast, Savarkar was putting forth a territorial and racial conception of Hinduism. Religion per se has little connection with Savarkar's conception of Hindutva: he was not primarily concerned with reform of Hinduism but with the political goal of creating a Hindu *rashtra* (nation).

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[147] Wilhelm Halbfass, *Tradition and Reflection Explorations in Indian Thought* (Albany: SUNY Press, 1991), 1. It is interesting to note that Max Weber believed that the "Vedas defy the dharma of Hinduism." Cited in Halbfass, *Tradition and Reflection Explorations in Indian Thought,* 1.
[148] Radhakrishnan, *The Hindu View of Life*, 3.
[149] *Yagnapurushdasji* at 1135.

Hence, when Justice Verma equated Hinduism with Hindutva he was not only collapsing the inclusivist and exclusivist models, he was also giving a highly political dimension to the judicial discourse on Hinduism.[150] It has already been observed how *Prabhoo* was welcomed by the Hindu nationalists as a vindication of Hindutva. Verma's additional move of equating Hindutva with 'Indianisation' gave the Court's seal of approval, in a sense, to the Hindu nationalists' conception of the nation. This is clearly illustrated in the 'Vision Document' released by the BJP prior to the last general elections in India in 2004. Under the sub-heading 'Cultural Nationalism' the document states, "Contrary to what its detractors say, and as the Supreme Court itself has decreed, Hindutva is not a religious or exclusivist concept. It is inclusive, integrative, and abhors any kind of discrimination against any section of the people of India on the basis of their faith."[151] The BJP, following the Verma judgment, says "Indianness, Bharatiyata and Hindutva" must be treated as synonyms.[152]

Madhok's strategy of using 'Hindutva' and 'Bharatiya' as interchangeable categories is now very much the centerpiece of the BJP's ideology. The vision document as well as recent speeches and interviews by Hindu nationalist leaders suggest that the language of inclusivism is being used to justify Hindutva and an exclusivist agenda. In early 2004, the RSS chief K.S. Sudarshan referred to

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[150] In an interview with the author in July 2004, Justice Verma refused to see *Prabhoo* as crucial to the understanding of Hinduism or Hindutva. He preferred to view it as revolving around "freedom of speech and expression." See Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, 202-12, for Verma's views.

[151] For the full text of the document see www.bjp.org.

[152] See www.bjp.org. It was former Prime Minister A.B. Vajpayee who resurrected Madhok's idea at the end of 2002 during his annual 'musings'. This was widely reported by most major dailies in India. Senior BJP leader L.K. Advani stressed this point in a recent interview to BBC when he said he preferred 'Bharatiyata' to 'Hindutva.' *The Pioneer*, September 10, 2004.

Yagnapurushdasji and said since the Supreme Court had said the term 'Hindu' referred to a way of life and not a religion, Muslims and Christians should be considered as Hindus.[153]

In a significant blurring of the boundaries of inclusivism and exclusivism, former Prime Minister Atal Bihari Vajpayee said in a recent interview, "Hindus cannot be fundamentalists. The Hindu worldview, we must remember, is inclusivist, as opposed to the exclusivist worldview of other faiths."[154] This brings one back to the point about the convergence of the inclusivist and exclusivist discourses in the Court's reading of Hinduism. Thus, the inclusivist discourse on Hinduism, as understood by Radhakrishnan or Gajendragadkar, has lent itself to interpretations that build on their failure to recognize India's composite and syncretistic culture.

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[153] *The Times of India* (Kolkata edition), January 25, 2004.

[154] See www.bjp.org. The interview was conducted before the 2004 general elections.

CHAPTER III

THE DOCTRINE OF ESSENTIAL PRACTICES: THE JUDGES SHAPE A RATIONAL HINDUISM

"[T]he most clearly forbidden church-state entanglement occurs when institutions of civil government use the legal process in order to discover religious error or to promulgate religious truth."[1] So writes a major American legal authority speaking for dominant theories in constitutional law. In this chapter, I examine how the Indian Supreme Court has traveled an opposite path, seeking to cleanse Hinduism of what it reads as superstition and providing it with a modernist and rationalist definition of religious error and religious truth.

I examine first how the courts have attempted to define religion in respect to the Constitution; and second, how the court in adjudicating cases pertaining to Hinduism has drawn a distinction between the sacred and the secular. Unlike the United States, where the Constitution stipulates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," the Indian Constitution combines freedom of religion clauses with a mandate to the state to intervene in religious affairs. Article 25 allows the state to regulate or restrict any "economic, financial, political or other secular activity which may be associated with

[1] Laurence Tribe, *American Constitutional Law* (Mineola: Foundation Press, 1988), p. 1232.

religious practice." It also provides for "social welfare and reform" of Hindu religious institutions. Articles 15[2] and 17[3] also prohibit some of the defining practices and usages associated with 'traditional' Hinduism such as untouchability and caste inequality. This has meant that the courts are frequently asked upon to decide what constitutes an "essential part of religion," thereby being off limits for state intervention, and what is "extraneous or unessential," thereby permissible for the state to interfere. Some legal scholars have labeled the Court's attempts to define what is fundamental to any religion the 'essential practices' doctrine.[4]

The most striking aspect of the essential practices doctrine is the constant attempt by the Court to fashion religion in the way a Nehruvian modernist state would like it to be rather than accept religion as represented by its practitioners. The essential practices test has been used by the Court to decide a variety of cases. These can broadly be classified under a few heads. First, the Court has taken recourse to this test to decide which religious practices are eligible for Constitutional protection. Second, the Court has used the test to adjudicate the legitimacy of legislation for managing religious institutions. Finally, the Court has employed this doctrine to judge the extent of independence that can be enjoyed by religious denominations. In this chapter I

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[2] Article 15(1): The state shall not discriminate against any citizen on grounds only of religion, race , caste, sex, place of birth or any of them
(4) Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Tribes.
[3] Article 17: Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable by law.
[4] Rajeev Dhavan and Fali Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities." Since the essential practices test has been used, with a few exceptions, to judge the constitutionality of Hindu practices, this chapter primarily looks at the judicial discourse on Hinduism and Hindu practices.

intend to show how the Court's use of the essential practices doctrine has served as a vehicle for legitimating a rationalized form of high Hinduism and delegitimating the usages of popular Hinduism as superstition. This has resulted in the sanction for an extensive regulatory regime for Hindu religious institutions and substantial limits on the independence of religious denominations.

Several studies have noted the unusual role of the Indian courts in interpreting religious doctrine and acting as the vanguard of religious reform. J.D.M. Derrett has written about the paradox of the Court playing the role of religious interpreter: "Therefore the courts can discard as non-essentials anything which is not proved to their satisfaction — and they are not religious leaders or in any relevant fashion qualified in such matters — to be essential, with the result that it would have no constitutional protection."[5] Rajeev Dhavan and Fali Nariman have offered a more scathing assessment.

> With a power greater than that of a high priest, *maulvi* or *dharmashastri*, judges have virtually assumed the theological authority to determine which tenets of a faith are 'essential' to any faith and emphatically underscored their constitutional power to strike down those essential tenets of a faith that conflict with the dispensation of the Constitution. Few religious pontiffs possess this kind of power and authority.[6]

In a similar vein, Marc Galanter asks whether the Constitution has given the Court a mandate to "participate actively in the internal reinterpretation of Hinduism."[7] I wish to extend this analysis by arguing that by employing a stripped down rationalist

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[5] J.D.M. Derrett, *Religion, Law and the State in India*, 447.
[6] Dhavan and Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," 259.
[7] Marc Galanter, *Law and Society in Modern India*, 251.

definition of religion and classifying any religious practice that falls outside this grid as "superstition" or "accretion", the Court has dispensed with pluralism and popular practices. This has been particularly true for Hinduism since the Constitution for all purposes can be seen as a "charter for the reform of Hinduism."[8]

The Colonial Courts

Though the colonial regime vacillated with respect to defining religion, the colonial judges foreshadowed the essential practices test in that they favored a more uniform, Brahmanical law over customary and popular law. Warren Hastings' 1772 regulation[9] would also set in motion a far-reaching project to codify Hindu and Muslim personal law by translating Sanskrit and Persian legal texts into English. The first such translation was *A Code of Gentoo Laws; or, Ordinations of the Pundits* by Nathaniel Brassey Halhed,[10] which was published in 1776. The works of William Jones (1746-1794) and Henry Thomas Colebrooke (1765-1837) would follow soon. Jones, founder of the Asiatic Society and one of the greatest British Orientalists, was a crucial figure in the codification of Hindu and Muslim law[11]. According to Bernard Cohn, "Jones and others believed there was historically in India a fixed body of laws, codes, that had been set down by 'law givers' and that over time had become corrupted by accretions,

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[8] Ibid., 247.
[9] Hastings, the first governor-general of India, directed that "in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mahomedans and those of the Shaster with respect to Gentoos shall be invariably adhered to."
[10] See Rosanne Rocher, *Orientalism, Poetry and the Millennium: The Checkered Life of Nathaniel Brassey Halhed* (Delhi: Motilal Banarsidass, 1983).
[11] See S.N. Mukherjee, *Sir William Jones: A study in eighteenth century British attitudes to India* (London: Cambridge University Press, 1968). For the Asiatic Society see, O.P. Kejariwal, *The Asiatic Society and the Discovery of India's Past, 1784-1838* (New Delhi: Oxford University Press, 1988).

interpretations, and commentaries."[12] The endeavors of Jones and his followers marked the onset of Brahmanisation or rationalization of law.

In this enterprise of 'fixing' Hindu and Muslim law the collaboration of *pandits* and *maulavis* was seen as indispensable and a serious obstacle at the same time. This was because, as W.H. Macnaughten eloquently put it, "To the Pundits is chiefly attributable the perplexity of the system which it is their province to expound."[13] Hence, Jones and his successors wanted to create an "Ur-text that would simultaneously establish *the* Hindu and Muslim law and free the British from depending on fallible and seemingly overtly susceptible *pandits* and *maulavis* for interpretations and knowledge had to be found or reconstituted. The task also had to be accomplished somehow by using the knowledge that their Indian guides, the mistrusted *pandits* and *maulavis*, seemed to monopolize."[14]

The project of codification would be transformed with the arrival of the Utilitarians. Unlike the Orientalists, Utilitarians like James Mill and Thomas Babington Macaulay saw Indian civilization occupying the lowest rung in the civilizational scale.[15] Macaulay's 1835 'Minute on Education', which advocated educating Indians in the English language rather than Sanskrit or Persian, was a

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[12] Bernard S. Cohn, *Colonialism and Its Forms of Knowledge* (New Delhi: Oxford University Press, 2002), 69.
[13] W.H. Macnaughten, *Hindu Law* (1829), p. iv.
[14] Cohn, *Colonialism and Its Forms of Knowledge*, 69.
[15] Eric Stokes writes, "James Mill's *History of British Inda* was principally an attempt to make a philosophic analysis of Indian society and assess its place in the 'scale of civilization'." Stokes, *The English Utilitarians and India* (Delhi: Oxford University Press, 1989), 55.

watershed event in charting a different course from the Orientalists.[16] Macaulay's attitude to law is summed by his remark during the debates in 1833 in the House of Commons over the renewal of the East India Company's Charter: "We do not mean that all the people of India should live under the same law: far from it. Our principle is simply this — uniformity where you can have it — diversity where you must have it — but in all cases certainty."[17] The onward march of codification was, however, interrupted by the 1857 revolt. Queen Victoria's 1858 proclamation, after the Crown took over the Indian empire, pledged a doctrine of non-interference in Indian religious practices. Though uniform codes of civil and criminal law were enacted after 1857, the domain of personal law was largely left untouched.

This preoccupation with "certainty" and "uniformity" would have a deep impact on the development of law in India, especially in relation to religious practices. One significant effect was the increasing preponderance of Brahmanical or "high-culture classic texts" in Court judgements on Hindu practices or customs. As the Rudolphs point out, "The main force encouraging Brahmanical law was the need for a legal order with greater generality and reach. The more cosmopolitan and uniform high-culture law was better able to meet the requirements of the times than was the more parochial and diverse customary law of village society."[18] The tension between the thrust for uniformity and jurisprudential techniques of the native legal experts

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[16] Macaulay famously wrote in the Minute: "I am quite ready to take the Oriental learning at the valuation of the Orientalists themselves. I have never found one among them who could deny that a single shelf of a good European library was worth the whole native literature of India and Arabia."
[17] Cited in George C. Rankin, *Background to the Indian Law* (Cambridge: Cambridge University Press, 1946), 137.
[18] Lloyd I. Rudolph and Susanne Hoeber Rudolph, *The Modernity of Tradition: Political Development in India* (Delhi: Orient Longman, 1987), 274.

would eventually result in the discontinuation of their services in 1864. Hence Derrett observes, "As it was, the British administrators insisted upon clarity, certainty and finality in terms foreign to Hindu tradition, and if the *pandit* was true to his *sastra* he could not at the same time substitute the new attempts at legislation for his own old authorities. Perhaps the attempts were doomed to failure."[19]

By the middle of the nineteenth century a substantial case law had built up allowing the colonial judges to invoke the principle of *stare decisis*. This was also symptomatic of the gradual infiltration of English common law techniques into the Indian courts. From as early as 1781, the English judges used to apply the principles of "justice, equity and good conscience"[20] whenever there was a perceived a gap in law. By the end of the nineteenth century, Cohn comments that the "publication of authoritative decisions in English had completely transformed 'Hindu law' into a form of English case law."[21] This meant that once a line of decisions had been established, the courts were reluctant to amend it even if there was contrary evidence from the native experts or in the scriptures. There were, however, critics like J.H. Nelson,[22] a civilian district judge in Madras, who spoke out against the move towards uniformity. But they were at best marginal voices at a time when a contemporary legal expert

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[19] Derrett, *Religion, Law and the State in India*, 269.
[20] J.D.M. Derrett, "Justice, Equity and Good Conscience in India," in *Essays in Classical and Modern Hindu Law*, IV (Leiden: Brill, 1978).
[21] Cohn, *Colonialism and Its Forms of Knowledge*, 75.
[22] See J.H. Nelson, *A Prospectus of the Scientific Study of the Hindu Law* (Madras: 1881). Also see Derrett, "J.H. Nelson: A forgotten administrator-historian of India," in C.H. Philips ed., *Histories of India, Pakistan and Ceylon* (London: Oxford University Press, 1961).

observed that "both the legislation and custom itself have been remodeled by a century of judicial decisions."[23]

The dominance of precedents and high culture texts meant that local customs and popular religion were continually undermined. Though in 1868 the Privy Council upheld the primacy of custom over written law,[24] recognition of customs was not considered a "viable option" and there was a "strong presumption in favor of the official Hindu Law."[25] Robert Lingat comments, "But though it was recognized that custom took precedence over the law of the *sastras*, the difficulty of its proof when the existence of custom had to be established, and the infinite diversity of customary rules forced the judges, more often than not, to fall back on the precepts of *smritis*…"[26] Hence, Derrett notes that the "British period saw the elimination of a great many customs diverging from the Anglo-Hindu law."[27]

The courts in independent India, especially in dealing with cases related to religion or religious practice, have operated under the shadow of the overriding principles of colonial courts: uniformity as exemplified by precedents and high culture texts and the marginalization of custom and popular practices. Of course, the most significant difference from the colonial period is that the post-colonial state has the Constitutional sanction to intervene in and reform Hindu institutions through legislation. The British did, at least till 1857, pursue a policy of reforming Hindu

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[23] Julius Jolly, *Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption* (Calcutta: 1885), 32.
[24] *Collector of Madura v. Moottoo Ramalinga* (1868), 12 Moore's Indian Appeals 397.
[25] Werner F. Menski, *Hindu Law: Beyond Tradition and Modernity* (New Delhi: Oxford University Press, 2003), 180.
[26] Robert Lingat, *The Classical Law of India* (New Delhi: Oxford University Press, 1998), 137.
[27] Derrett, *Hindu Law, Past and Present* (Calcutta: A Mukherjee, 1957), 78.

practices. Even in the post-1857 period, as the Rudolphs argue, the rationalization and codification of religion continued in a more subtle way. But the dilemma of the colonial state was expressed by the Law Commission in 1855: "The Hindu and Mohammedan law derive their authority respectively from the Hindoo and Mahomedan religion. It follows that a British legislature cannot make Mahomedan or Hindu law."[28]

The post-colonial state is under no obligation to steer clear of the controversial task of rationalizing religion. However, the enlarged scope of state intervention in management of Hindu religious institutions and practices has meant that the post-colonial courts have been asked on numerous occasions to arbitrate on the legitimacy and limits of state legislation and to interpret the freedom of religion clauses in the Constitution. This has meant that the courts occupy a critical space in defining the content of religion, in legitimizing certain religious practices and in marginalizing other practices. This has also resulted in the courts becoming the focal point for the tension between the reformist values of the Constitution and the traditional sources of legal and religious authority. In the following sections, I survey some of the important cases that will help map the judicial discourse on religion, especially the essential practices doctrine, highlight the internal contradictions and tensions of this discourse and show how it has come to dominate the courts.

[28] Cited in Rankin, *Background to the Indian Law*, 158.

Defining Essential Practice

As we have seen, the essential practices doctrine was a derivative discourse of the colonial-era doctrine of "justice, equity and good conscience." After independence, it was first articulated in *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshimindra Thirtha Swamiar of Sri Shirur Mutt*[29] also known as the *Shirur Mutt* case. It is important to consider this case in some detail since it is has become obligatory to cite *Shirur Mutt* in most cases related to reform of Hindu religious institutions. Not only was the meaning of religion, as protected by the Constitution, enunciated in *Shirur Mutt*, but also guidelines as to who qualified as a religious denomination were set forth.

In *Shirur Mutt*, the petitioner, the superior or *mathadhipati* (also referred to as *mahant*) of Shirur Mutt, challenged the Madras Hindu Religious and Charitable Endowments (HRCE) Act, 1951,[30] on the principal ground that it infringed Article 26 of the Constitution. Before dealing with the provisions of the Act the Court asked a central question: "[W]here is the line to be drawn between what are matters of religion and what are not?"[31] To come up with a working definition of religion Justice B.K. Mukherjea, who wrote the judgment, drew on examples from the United States and Australia. He rejected the definition of religion offered by the US Supreme Court in *Davis v. Beason*: "[T]he term religion has reference to one's views of his relation to

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[29] (1954) Supreme Court Appeals (SCA) 415.

[30] For background to the HRCE Act and the state's efforts to regulate temples, see Franklin A. Presler, *Religion Under Bureaucracy: Policy and Administration for Hindu Temples in India* (Cambridge: Cambridge University Press, 1987) and Chandra Y. Mudaliar, *The Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras* (Wiesbaden: Franz Steiner Verlag, 1974).

[31] *Shirur Mutt* at 430.

his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter."[32] The Court pointed out the inadequacy of this definition in the Indian context by noting that there are major religions like Buddhism or Jainism "which do not believe in God or in any Intelligent First Cause."[33]

Instead, Mukherjea drew on the *Adelaide Company v. Commonwealth* judgment in Australia where the Court said the Constitution not only protected "liberty of opinion" but also "acts done in pursuance of religious belief as part of religion."[34] Collapsing the belief-practice dichotomy, the justice observed, "A religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion…"[35]

It should be mentioned here that this definition of religion, which included rituals and ceremonies as "integral", was significantly different from the definition offered by the Bombay High Court in an earlier case. In *Ratilal Panachand v. State of*

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[32] *Davis v. Beason*, 133 U.S. 333 (1890). Cited in *Shirur Mutt* at 430.
[33] *Shirur Mutt* at 431.
[34] 67 C.L.R. 116, 127.
[35] *Shirur Mutt* at 431.

Bombay,[36] where the constitutional validity of the Bombay Public Trusts Act of 1950 had been challenged, Chief Justice M.C. Chagla observed that "whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution." In the same judgment, Chagla stated, "Essentially religion is a matter of personal faith and belief, of personal relation of an individual with what he regards as his Maker or his Creator or the higher agency which he believes regulates the existence of sentient beings and the forces of the Universe."[37] The definition from *Shirur Mutt* cited earlier shows that the high court's narrow definition of religion was rejected by Mukherjea. Subsequently, the *Ratitlal* judgment, too, was overturned by Mukherjea when the case came up for hearing before the Supreme Court.

According to Mukherjea, the American and Australian Constitutions did not impose any limitation on the right to freedom of religion. It was the American and Australian courts that introduced the limitations on the grounds of "morality, order and social protection."[38] Mukherjea, however, believed that the Indian Constitution was an improvement on other Constitutions since it clearly laid out what could be regarded as religion: "Our Constitution-makers, however, have embodied the limitations which have been evolved by judicial pronouncements in America or Australia in the Constitution itself and the language of Articles 25 and 26 is sufficiently clear to enable

[36] AIR 1953 Bom. 242.
[37] *Shirur Mutt* at 431.
[38] Ibid., 434.

us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not."[39]

According to the Court, "what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself."[40] This "essential part" of religion is protected by the Constitution: "Under Article 26(b), therefore, a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."[41] However, the state can legitimately regulate religious practices when they "run counter to public order, health and morality" and when they are "economic, commercial or political in their character though they are associated with religious practices."[42]

Shirur Mutt was also a landmark judgment because it validated a major portion of the Madras HRCE Act, 1951, which was the first state legislation to put in place an elaborate regulatory mechanism for Hindu temples and *maths*. Several other states followed suit with similar legislation, which were also taken to court, but *Shirur Mutt* has remained the model for the Court. There is no need here to go into the details of the Shirur Mutt judgment regarding the Madras HRCE Act. In passing it should be mentioned that the Court did recognize that a *mathadhipati* or *mahant* was not a "mere manager," but he "has not only duties to discharge in connection with the endowment

[39] Ibid., 434.
[40] Ibid., 432.
[41] Ibid., 435.
[42] Ibid., 432.

but he has a personal interest of a beneficial character which is sanctioned by custom...."[43] The Court further said since the *mathadhipati* was the head of a spiritual fraternity, he could not treated as "a servant under a State department." With regard to the powers of the government bureaucrats to interfere in affairs of the math, the Court struck down certain provisions including the right of unrestricted entry into religious institutions for the Commissioner, HRE, or his subordinates. The Court said, "It is well known that there could be no such thing as an unregulated and unrestricted right of entry into a public temple or religious institution for persons who are not connected with the spiritual functions thereof."[44] The Court also struck down a section that required a head of a religious institution to be guided by bureaucrats on how to spend the funds of the institution. However, it is noteworthy that Court in large measure gave its approval to the elaborate apparatus of state control of Hindu temples and religious institutions.

The primary contribution of *Shirur Mutt* to the legal discourse on religion was the recognition that "protection under Articles 25 and 26 was not limited to matters of doctrine or belief only but extended to acts done in pursuance of religion and therefore contained guarantees for rituals, observances, ceremonies and modes of worship."[45] Another important principle enunciated by Justice Mukherjea was the "complete autonomy" granted to religious denominations to decide which religious practices were essential for them. Mukherjea reiterated this point in *Ratilal*, which was decided

[43] Ibid., 427.
[44] Ibid., 437.
[45] Mudaliar, *The Secular State and Religious Institutions in India: A Study of the Administration of Hindu Public Religious Trusts in Madras*, 186.

by the Supreme Court the same year as *Shirur Mutt*: "Religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines... No outside authority has any right to say that these are not essential parts of religion and it is not open to the secular authority of the State to restrict or prohibit them in any manner they like under the guise of administering the trust estate."[46] Finally, *Shirur Mutt* is a landmark case because it contained a deeply contradictory trend — though the judgment is celebrated for widening the definition of religion to include rituals and practices, at the same time it sanctioned an elaborate regulatory regime for religious institutions. This anomaly has been noted by P.K. Tripathi: "In the final analysis, therefore, articles 25 and 26 do not emerge from the judgment in the Swamiar case as very effective weapons of attack on social legislation affecting the management of religious institutions."[47]

The Textual Turn

Although a broad definition of religion was laid out in *Shirur Mutt*, the subsequent judgements of the Supreme Court would radically circumscribe the religious practices that were guaranteed Constitutional protection. Even before the essential practices doctrine was formally pronounced in *Shirur Mutt*, the Supreme Court had occasion to pass judgment on whether an attempt to create an unusual perpetuity was in consonance with Hinduism. The central issue in *Saraswathi Ammal v. Rajagopal*

[46] 1954 SCA 548.
[47] P.K. Tripathi, "Secularism: Constitutional Provision and Judicial Review," in G.S. Sharma ed., *Secularism: its Implications for Law and Life in India* (Bombay: 1966).

Ammal[48] was not interpretation of the freedom of religion clauses or reform of a religious institution. The issue at stake was the right of a woman to set up a perpetuity to have worship conducted at the *samadhi* (or burial place) of her deceased husband. Speaking for the Court, Justice Jagannadhadas exercised the right of the Court to decide whether this practice was Hindu or not. However, instead of making the essential versus non-essential argument made in *Shirur Mutt*, Jagannadhadas preferred to refer to the Hindu scriptures. The Court said, "To the extent... that any purpose is claimed to be a valid one for perpetual dedication on the ground of religious merit though lacking in public benefit it must be shown to have a shastraic basis so far as Hindus are concerned." The Court went to say that the "heads of religious purposes determined by belief in acquisition in religious merit cannot be allowed to be widely enlarged consistently with public policy and needs of modern society."[49]

Though the case is not so significant in the development of the essential practices doctrine, the Court was making certain points which were of enormous significance to the future judicial discourse on religion. First, the Court was referring, like the colonial judges, to the sacred texts or *shastras* to judge the legitimacy of a religious practice. Second, contrary to *Shirur Mutt*, the Court was not willing to accept the claim of an individual or group regarding a religious practice. Third, the Court was bringing to the fore the need to judge religious practices by the rules of "modern society." The interpretation of the court, which differs markedly from the *Shirur Mutt* judgment, shows the contradictions between a court committed to modernization of

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[48] AIR 1953 SC 491.
[49] Ibid., 491.

religion and the need to appeal to traditional authorities to justify its decisions. It also shows the willingness of the Court to put "public policy" before an individual or community's religious practice.

The contradictions between traditional texts and the reformist values expressed in the Constitution would become more apparent in *Sri Venkatramana Devaru v. State of Mysore*.[50] One reason why this case is interesting is that the Court had to weigh the religious freedom of a group against the right of the state to reform a religious practice. But what is more directly relevant to this analysis is the way the Court tackled the primary subject of the case — unrestricted right of entry of Harijans into a temple founded by Brahmins — by seeking evidence from the Hindu scriptures. The issue before the Court was the applicability of the Madras Temple Entry Authorisation Act, which was intended to remove the bar on Harijans (untouchables) from entering the Shri Venkatramana temple founded by the Gowda Saraswath Brahmins. The original suit was filed by the trustees of the temple in 1949, a year before the Constitution came into effect. Originally, the appellants claimed that the temple was a private one and therefore exempt from the Act. But once the Constitution was in force, the appellants also claimed that the temple was in addition a denominational one and hence entitled to protection under Article 26. Justice Venkatarama Aiyar, speaking for the Court, presented the primary question thus: "The substantial question of law, which arises for decision in this appeal, is whether the right of a religious denomination to manage its own affairs in matters of religion guaranteed under Art. 26

[50] AIR 1958 SC 255.

(b) is subject to and can be controlled by, a law protected by Art. 25(2)(b), throwing open a Hindu temple to all classes and sections of Hindus."[51]

The Court accepted the claims of the appellants that the Venkatramana temple was indeed a "denominational temple founded for the benefit of the Gowda Saraswath Brahmins."[52] Then the Court proceeded to consider whether the Gowda Saraswaths, exercising the right of a religious denomination under Article 26(b), were "entitled to exclude other communities from entering into it for worship on the ground that it was a matter of religion."[53] This immediately brought into play the essential practices doctrine to determine "whether exclusion of a person from entering into a temple for worship is a matter of religion according to the Hindu Ceremonial Law."[54] Here it must be mentioned that the then solicitor-general of India, C.K. Daphtary, who had appeared in the case for the state, had argued that exclusion of persons from temples was not a matter of religion.

Unlike *Saraswathi Ammal* and later cases, which will be discussed in subsequent sections, the Court did not resort to a modernist rhetoric. Instead it relied on a scriptural exegesis and case law to examine the practice of excluding Harijans from worshipping in temples, which can be regarded as one of the practices defining untouchability. Justice Aiyar first took up the question of idolatry in Hinduism and commented that there was a difference in opinion as to "whether image worship had a

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[51] Ibid., 259.
[52] Ibid., 264.
[53] Ibid., 264.
[54] Ibid., 264.

place in the religion of the Hindus as revealed in the Vedas."[55] He said the hymns of the Upanishads describe the Supreme Being as "omnipotent, omniscient and omnipresent", but the later Puranas establish the notion of the Trinity with Brahma, Vishnu and Shiva as manifestations of the three aspects of creation, preservation and destruction.

The Court viewed the Puranic period as the time when "daily worship of the deity in temple came to be regarded as one of the obligatory duties of a Hindu."[56] The construction of temples meant that increasing "attention came to be devoted to the ceremonial law relating to the construction of temples, installation of idols therein and conduct of the worship of the deity."[57] This was also the time when treatises devoted to the ceremonial law of worship were written. The Court identified the 28 Agamas as the principal texts for temple practices specifying rules as to how a temple is to be constructed, where the idols are to be placed and where the worshippers should stand.

Having traced the evidence in the Hindu texts the Court invoked a 1915 Madras High Court judgment[58] to close the issue of exclusion in Hindu temples. The judgment had this to say about the Agamas: "In the Nirvachanapaddhati it is said that Sivadwijas should worship in the Garbagriham, Brahmins from the ante chamber or Sabah Mantabam, Kshatriyas, Vysias and Sudras from the Mahamantabham and that castes yet lower in scale should content themselves with the sight of the Gopuram."[59] This judgment was affirmed by the Privy Council in *Sankarlinga Nadan v. Raja*

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[55] Ibid., 264.
[56] Ibid., 264.
[57] Ibid., 264.
[58] *Gopala Mooppanar v. Subramania Aiyar*, AIR 1915 Mad. 363.
[59] *Devaru* at 265.

Rajeswara Dorai where it ruled that a trustee who admitted into a temple persons who were not entitled to enter the premises, as prescribed the Agamas, were guilty of breach of trust. Based on his reading of the sacred texts and case law, Aiyar concluded: "Thus, under the ceremonial law pertaining to temples, who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion."[60]

The Court, however, did not bring into play Article 17, which abolishes untouchability. The Court opined that Article 17 did not apply to denominational temples: "There is, it should be noted, a fundamental distinction between excluding persons from temples open for purposes of worship to the Hindu public in general on the ground that they belong to the excluded communities and excluding persons from denominational temples on the ground that they are not objects within the benefit of the foundation."[61]

This meant that, according to the Court, the right of the Gowda Saraswaths to exclude persons from worshipping in the temple guaranteed by Article 26(b) clashed with the right of the state to open public temples to all Hindus under Article 25(2)(b). In Aiyar's words, the case involved "two provisions of equal authority, neither of them being subject to the other."[62] The Court found a way out of this impasse by giving Article 25(2)(b) precedence over Article 26 by pointing out that the language of Article 25(2)(b) implied the limitations were applicable to all Hindu religious institutions, including denominational ones. The Court referred to this as the rule of

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[60] Ibid., 265.
[61] Ibid., 267.
[62] Ibid., 268.

"harmonious construction" and sought to ameliorate the ruling by stating that the state's right to intervene in religious institutions was subject to limitations. In a minor concession to the appellants, the Court said "that during certain ceremonies on special occasions it was only members of the Gowda Saraswath Brahmin community that had the right to take part therein, and that on those occasions, all other persons would be excluded."[63]

The *Devaru* ruling, in theory, followed the essential practices doctrine of *Shirur Mutt* by accepting that religion encompassed rituals and practices. However, the other cardinal principle laid out in *Shirur Mutt* regarding the "autonomy" of a religious denomination to decide what ceremonies are essential was breached. *Devaru* clearly illustrated that it was the Court which was to decide what practices are essential to any religion. What was striking about *Devaru* was the way it referred to Hindu scriptures to justify the exclusion of lower castes from the temple when it could have easily referred to other discourses within Hinduism, notably the Bhakti tradition, to argue the opposite case. But having found a textual basis for excluding lower castes the Court could not possibly legitimize that practice since it clashed with the state's avowed intention to stamp out caste discrimination. Hence the Court strategically used a "harmonious construction" to find an acceptable solution. The Court's role in deciding what was "essential" to any religion would be enhanced in subsequent cases. So also would the explicit reliance on a modernist rhetoric and a reduced dependence on scriptures.

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[63] Ibid., 269.

Redefining Essential Practices

Two cases in the early 1960s would substantially reformulate the essential practices doctrine. The rulings in both these cases were handed down by Justice P.B. Gajendragadkar, who later went on to become the Chief Justice of India. The first of these cases was *Durgah Committee v. Hussain Ali.*[64] In this case, the *khadims*[65] of the shrine of Moinuddin Chishti in Ajmer challenged the Durgah Khawaja Saheb Act of 1955. Among other things the *khadims* contended that the Act abridged their rights as Muslims belonging to the Sufi Chishtia order. The *khadims* maintained that their fundamental rights guaranteed by several Constitutional provisions, including Articles 25 and 26, had been violated.

Unlike Justice Aiyar in *Devaru*, Gajendragadkar did not make any reference to the scriptures. Instead, he skillfully constructed a 'secular' history of the Ajmer shrine to "ascertain broadly the genesis of the shrine, its growth, the nature of the endowments made to it, the management of the properties thus endowed, the rights of the Khadims…"[66] After surveying the history of the shrine from the pre-Mughal period to the contemporary period, the Court concluded that the administration of the shrine "had always been in the hands of the official appointed by the State."[67] The Court, however, conceded that the Chishtia sect could be regarded as religious denomination. But this did not eventually have any impact on the Court's decision

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64 AIR 1961 SC 1402.
65 According to the *khadims*, they were descendants of two followers of the twelfth century Sufi saint Khwaja Moinuddin Chisti, whose tomb at Ajmer is known as the Durgah Khwaja Saheb. The *khadims* also claimed they belonged to a religious denomination known as the Chishtia Sufis.
66 *Durgah Committee* at 1406.
67 Ibid., 1410.

which upheld the validity of the Durgah Khawaja Saheb Act and dismissed the Constitutional challenges to the Act. In doing so Gajendragadkar issued a "note of caution" that would not only highlight the role of the Court in deciding what was an "essential and integral" part of religion but also make a distinction for the first time between "superstitious beliefs" and religious practice.

> Whilst we are dealing with this point it may not be out of place to incidentally to strike a note of caution and observe that in order that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may make a claim for being treated as religious practices within the meaning of Art. 26. Similarly *even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself.* Unless such practices are found to constitute an essential and integral part of religion their claim for the protection under Art. 26 may have to be carefully scrutinized; in other words, the protection must be confined to such religious practices as are an essential and integral part of it and no other (italics added).[68]

This extraordinary statement by the Court pushed the essential practices doctrine in a new direction. The Court was not only going to play the role of the gatekeeper as to what qualified as religion, but now it was also taking up the role of sifting superstition from 'real' religion. This was a clear statement of the Court's role — which had not been so overt till now — in rationalizing religion and marginalizing practices that did not meet the Court's test.

This redefinition of the essential practices test and the enhanced role of the Court in rationalizing religion would be articulated by Gajendragadkar in two more

[68] Ibid., 1415.

landmark cases that were decided soon after *Durgah Committee*. The first was *Shri Govindlalji v. State of Rajasthan*[69] where the Tilkayat Govindlalji, the traditional spiritual head of the Nathdwara temple in Rajasthan, challenged the constitutionality of the Nathdwara Temple Act. One of the grounds for challenging the Act was infringement of Articles 25, 26(b) and 26(c) since it was claimed that the temple was a private one owned and managed by the Tilkayat as head of the Vallabh denomination. By reconstructing the doctrine of the Vallabha school and the history of the temple, the Court held that the temple was a private one and that Tilkayat was "merely a custodian, manager and trustee of the temple." The Court endorsed the Act laying special emphasis on a *firman* (order) issued by the ruler of Udaipur in 1934 which declared that the royal court had absolute rights to supervise the temple and its property and even depose the Tilkayat if necessary.

While the outcome of *Govindlalji* was unexceptional given the history of the Court in sanctioning state regulation of religious institutions, Gajendragadkar in his judgment pointed out why the claims of a community regarding their religious practices could not always be accepted.

> In cases where conflicting evidence is produced in respect in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would therefore break down. The question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if its is, whether it can be regarded as an integral or essential part of religion, and the finding of the Court on such

[69] AIR 1963 SC 1638

an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tenets of its religion.[70]

Though Gajendragadkar admitted that this approach may present some difficulties since "sometimes practices, religious and secular, are inextricably mixed up," he was confident that the Court would be able to distinguish between religious and what was "obviously" a secular matter. Gajendragadkar thus rejected the argument of the senior advocate, representing the appellants, who quoted from the Australian court ruling in *Jehovah's Witness v. Commonwealth*: "[W]hat is religion to one is superstition to another." The Court dismissed this proposition as of "no relevance".

> If an obviously secular matter is claimed to be [a] matter of religion, or if an obviously secular practice is alleged to be a religious practice, the Court would be justified in rejecting the claim… a claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations and cannot attract the provisions of Art. 25(1) and Art. 26(b).[71]

This line of thinking would reach its culmination in *Shastri Yagnapurushdasji* which was yet another case involving a religious group — this time the Satsangis — seeking protection from the Bombay Harijan Temple Entry Act. Unlike some of the denominations discussed earlier, the Satsangis claimed the status of a separate religion as followers of Swaminarayan. In his judgment, which has been discussed in the last chapter, Gajendragadkar said, "It may be conceded that the genesis of the suit is the genuine apprehension entertained by the appellants, but as often happens in these

[70] Ibid., 1460-61.
[71] Ibid., 1461.

matters the said apprehension is founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself."[72]

Though *Durgah Committee* and *Govindlalji* represent the dominant trend there were differences of opinion in the Bench about the reformist and rationalist thrust of the Court. *Saifuddin Saheb v. State of Bombay*,[73] which is chronologically placed between *Durgah Committee* and *Govindlalji*, illustrated the split in the Court on how far the judiciary should interfere in and reform religion. It must be noted that there was no disagreement on the essential practices doctrine but there was disagreement on the extent to which it should be applied. In *Saifuddin*, the Bombay Preventon of Excommunication Act of 1949 had been challenged by the Dai-ul-Mutlaq, who was the religious head of the Dawoodi Bohra community. The majority judgment delivered by Justice K.C. Dasgupta declared the Act unconstitutional by holding that "excommunication cannot but be held to be for the purpose of maintaining the strength of the religion."[74] In a concurring judgment, Justice N.R. Ayyangar wrote, "The power of excommunication for the purpose of ensuring the preservation of the community, has therefore prime significance in the religious life of every member of the group."[75]

However, in a strong dissent Chief Justice B.P Sinha pointed out that even if excommunication was a matter of religion, the Act would still be valid since it was in

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[72] *Yagnapurushdasji* at 1135.
[73] AIR 1962 SC 853.
[74] Ibid., 869.
[75] Ibid., 876.

the interest of "public welfare."[76] In language reminiscent of Gajendragadkar, Sinha wrote, "The impugned Act, thus, has given full effect to modern notions of individual freedom to choose one's way of life and to do away with all those undue and outmoded interferences with liberty of conscience, faith and belief. It is also aimed at ensuring human dignity and removing all those restrictions which prevent a person from living his own life so long as he did not interfere with similar rights of others."[77] Citing the essential practices doctrine Sinha argued that the actions of the Dai "in the purely religious aspects are not a concern of the courts."[78] Sinha, like Gajendragadkar, was confident of separating 'pure' religious practices from those that fell within the 'secular' realm. Sinha argued that the Dai's right to excommunicate affected the "civil rights of the members of the community" and on this ground he argued for upholding the Bombay Act.

The series of rulings in the early 1960s firmly established the principle that it was the Court's task to ascertain what constituted religious doctrine and practice. The Gajendragadkar rulings went further and specified that even practices that can be accepted as religious might be classified as superstition or irrational. Some scholars point out that redefinition of the essential practices doctrine was partly fuelled by fears that *Devaru* and *Saifuddin* had widened the scope of religion in the public sphere and consequently impeded social reform.[79] Dhavan and Nariman's assessment in 1997 sums up the situation as it was after *Yagnapurushdasji*: "Judges are now endowed

[76] Ibid., 859.
[77] Ibid., 860-61.
[78] Ibid., 865.
[79] Tripathi, "Secularism: Constitutional Provision and Judicial Review," 183.

with a three step inquiry to determine, in tandem, whether a claim was religious at all, whether it was essential for the faith and, perforce, whether, even if essential, it complied with the public interest and reformist requirements of the Constitution."[80]

Essential Practice Entrenched

The role of the Court in determining what constitutes religion as well as essential religious practice has remained undiminished since the formative years of this doctrine. Subsequent rulings have built on case law but hardly ever reconsidered the doctrine of essential practices. The most prominent effect of this doctrine has been the widening net of state regulation over temples. Another significant effect has been the marked disinclination of the Court to accept more recent religious groups as a 'proper' religion or even religious denomination. Consequently, the religious practices of these groups have not been able to pass the essential practices test. Of course, given the all-encompassing definition of Hinduism in *Yagnapurushdasji* it is unlikely any sect within Hinduism is ever going to get the court's approval as a separate religion. This was quite clearly illustrated in the case of Ramakrishna Mission, which was accorded a 'religious minority' i.e. separate religion status by Calcutta High Court only to have it changed to a religious denomination status by the Supreme Court.

Before looking at regulation of religious institutions I will briefly touch on two cases from the 1980s where the Court had to make a decision on the claim of an established group for a religious denomination status and second, the Court had to

[80] Dhavan and Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," 260.

decide whether a religious practice was essential or not. The first case involved the followers of Sri Aurobindo and the second concerned the group known as Ananda Margis. In *S.P. Mittal v. Union of India*,[81] the legitimacy of the Auroville[82] (Emergency Provisions Act) Act of 1980 was challenged. One of the questions before the Court was whether the Aurobindo Society qualified as a religious denomination and hence came under the protection of Article 26. After discussing the meaning of religion, and quoting extensively from Aurobindo's writings as well as secondary sources, Justice R.B. Misra, writing for the majority, ruled "there is no room for doubt that neither the Society nor Auroville constitutes a religious denomination and the teachings of Sri Aurobindo only his philosophy and not a religion."[83]

The inconsistency of the majority position was pointed out by Justice O. Chinnappa Reddy in his dissenting opinion. Reddy argued that religion cannot be "confined to the traditional, established, well-known or popular religions like Hinduism, Mohammedanism, Buddhism and Christianity."[84] According to Reddy, religion and religious denomination must be interpreted in a "liberal, expansive way". He referred to *Shirur Mutt* where it was stated that the different sects under Hinduism could be designated as religious denominations. In keeping with this view, Reddy wrote, "But this fact stands out prominently that whatever else he was, he truly was a religious teacher and taught and was understood to have taught new religious doctrine

[81] AIR 1983 SC 1.
[82] Auroville is a township in Pondicherry founded by a French follower of Aurobindo, M. Alfasse, who is also known as the Mother by Aurobindo devotees.
[83] *Mittal* at 30.
[84] Ibid., 4.

and practice."[85] However, Reddy maintained that Auroville was not a place of worship but a township.

A year after the Supreme Court ruled that Aurobindo was not a religious teacher, the Court decided that the Ananda Margis were a religious denomination. However, in *Jagadishwaranand v. Police Commissioner, Calcutta*,[86] the Court refused to accept the *tandava* dance as an essential practice of the Ananda Margis. Writing for the Court, Justice Ranganath Misra reasoned, "Ananda Marga as a religious order is of recent origin and *tandava* dance as a part of religious rites of that order is still more recent. It is doubtful as to whether in such circumstances *tandava* dance can be taken as an essential religious rite of the Ananda Margis."[87]

Interestingly, a single bench of Calcutta High Court, in a rare occurrence, took a contrary line when asked to reconsider the case.[88] Justice Bhagabati Prasad Banerjee wrote, "The concept of *tandava* dance was not a new thing which is beyond the scope of the religion. The performance of *tandava* dance cannot be said to be a thing which is beyond the scope of religion. Hindu texts and literatures provide [for] such dance. If the Courts started enquiring and deciding the rationality of a particular religious practice then there might be confusion and the religious practice would become what the courts wish the practice to be."[89] This was a strong indictment of the essential practices doctrine followed by the Supreme Court since the 1960s and a plea for reconsideration of the Court's role in determining the rationality of religious practices.

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[85] Ibid., 11.
[86] AIR 1984 SC 51.
[87] Ibid., 57.
[88] AIR 1990 Cal. 336.
[89] Ibid., 350.

That was not the end of the story of the Ananda Margis. In March 2004 the Supreme Court again took up the issue and further narrowed the scope of essential practices to mean the foundational "core" of a religion. The majority judgment said, "The essential part of a religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built. Without which, a religion will be no religion."[90] However, Justice A.R. Lakshmanan contested this definition of essential practices and wrote in his dissent, "If these practices were accepted by the followers of such spiritual head as a method of achieving their spiritual upliftment, the fact that such practice was recently introduced cannot make it any the less a matter of religion."[91]

Temple Take-over and Dharma

The essential practices test was one of the major tools whereby the Supreme Court sanctioned a complex regulatory regime for Hindu temples. As has been noted earlier, in Shirur Mutt the Court gave its approval to the bulk of the Madras Hindu Religious and Charitable Endowments (HRCE) Act, 1951. Soon after the Madras HRCE Act, most states in India put in place regulatory mechanisms in place for Hindu religious institutions. Though many of these state legislations were challenged, they were usually approved by the Court with minor alterations. One of the consequences of this has been the bureaucratization of religion with state-appointed officers taking over the

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[90] *The Hindu*, March 12, 2004.
[91] Ibid.

running of temples at the expense of traditional authorities. The undermining of traditional heads of temples such as the Nathdwara or the Jagannath temple at Puri had already begun from the 1960s. Temple functionaries like the *archakas* (priests) and other intermediaries like *pandas* and *sevaks* (attendants) have also been severely affected. *E.R.J. Swami v. State of T.N.*[92] was one of the first cases where the hereditary principle for temple priests was held to be void. In *Swami*, writing for the Court Justice D.G. Palekar ruled that the *archaka* was appointed by the managers of the temple (*dharam karta* or *shebait*) and the fact that after his appointment the *archaka* "performs worship is no ground for holding that the appointment is either a religious practice or a matter of religion."[93]

There was a spate of litigation in the 1990s centered on major Hindu shrines like Tirupathi, Vaishno Devi, Jagannath temple (Puri) and the Kashi Vishwanath temple (Varanasi). The majority of the judgements, where challenges to the extensive state regulation of these temples were dismissed, were handed down by Justice K. Ramaswamy. This has led Dhavan and Nariman to observe, "If the regulatory impetus provided by Justice B.K. Mukherjea in the fifties was enlarged by Justice Gajendragadkar in the sixties, the latest judgements of Justice K. Ramaswamy have enthusiastically supported the 'nationalization' of some of India's greatest shrines."[94] Instead of examining in detail the separate judgements on temple regulation, I look at

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[92] AIR 1972 SC 1586.
[93] Ibid., 1597.
[94] Dhavan and Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," 263.

one case which best sums up Ramaswamy's understanding of the nature of religion and the essential practices doctrine.

In *A.S. Narayana Deekshitulu v. State of A.P.*,[95] the petitioner was a chief priest (*archaka*) of Thirumala Tirupathi, which is one of the richest temples in India. The petitioner contended that the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act of 1987 by abolishing hereditary succession among *archakas*, prescribing regulations for appointment of archakas and taking away their right to a share of offerings made to the deity infringed Articles 25 and 26 of the Constitution. The Court dismissed the petition and upheld the Act with a few minor qualifications. However, in the course of the judgment Ramaswamy (like Mukherjea in *Shirur Mutt* and Gajendragadkar in *Yagnapurushdasji*) went in for an elaborate discussion on the nature of religion in the Indian context. Quoting from texts such as the Vedas, Upanishads and the Gita and using modern thinkers and writers such as Aurobindo, Vivekananda, Radhakrishnan, Shankar Dayal Sharma and even Richard Dawkins, Ramaswamy attempted to construct a notion of religion significantly different from *Shirur Mutt*.

Taking the cue from Aurobindo's distinction between "true religion", which is spiritual, and "religionism", which is narrow and focussed on ceremonies, Ramaswamy proposed, "The importance of rituals in religious life is relevant for evocation of mystic and symbolic beginnings of the journey but on them the truth of a religious experience cannot stand. The truth of a religious experience is far more

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[95] AIR 1996 SC 1765.

direct, perceptible and important to human existence. It is the fullness of religious experience which must be assured by temples, where the images of the Lord in resplendent glory is housed… It is essential that the value of law must be tested by its certainty in reiterating the Core of Religious Experience and if a law seeks to separate the non-essential from the essential so that the essential can have a greater focus of attention in those who believe in such an experience, the object of such a law cannot be described as unlawful but possibly somewhat missionary."[96]

Ramaswamy drew a parallel between a 'higher' or 'core' religion and the concept of *dharma*. According to Ramaswamy, it is *dharma* rather than conventional religion that is protected by the Constitution. How then is *dharma* to be understood in terms of the Constitution? "*Dharma* is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection."[97] Interestingly, this extraordinary position is supported by Justice B.L. Hansaria, the other judge on the Bench, in a separate judgment: "The word religion, as presently understood, is comprised of rituals, customs, and dogmas surviving on the basis of fear and blind faith; whereas *dharma* encapsulates those great laws and disciplines that uphold, sustain, and ultimately lead humanity to the sublime heights of worldly and spiritual glory."[98]

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[96] Ibid., 1790.
[97] Ibid., 1790.
[98] Ibid., 1807.

The idea of a higher or 'dharmic' religion, according to Ramaswamy, is fundamental to the essential practices doctrine and the secular Constitution. He states:

> In secularizing the matters of religion which are not essentially and integral parts of religion, secularism, therefore, consciously denounces all forms of super-naturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are anti-thesis to secularism which seeks to contribute to some degree to the process of secularization of the matters of religion or religious practices.[99]

Ramaswamy finds a congruence between the 'secularization' of religion and the religious freedom guaranteed by the Constitution: "The religious freedom guaranteed by Articles 25 and 26, therefore, is intended to be a guide to a community-life and ordain every religion to act according to its cultural and social demands to establish an egalitarian social order."[100] The unusual redefinition of religion and religious freedom in *Narayana* is far removed from what Mukherjea in 1954 had originally proposed in *Shirur Mutt*. The distinction between 'essential' religion and 'superstition' had been articulated by Gajendragadkar. But the conception of religion as *dharma* which can somehow foster an egalitarian society and a unified nation is certainly a novel position so far as the Supreme Court was concerned.

Conclusion

The foregoing discussion of the case law on the definition of religion and the essential practices doctrine enables us to make a few hypotheses about the nature of the Court's

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[99] Ibid., 1792-93.
[100] Ibid., 1793.

intervention in the place of religion in the public sphere. The post-colonial court is at the vanguard of the state's project to reform and rationalize religion. This in a way mirrors the colonial court's use of the "justice, equity and good conscience" test to impose a rationalist view of religion. The essential practices doctrine can plausibly be traced to the so-called Father of the Indian Constitution B.R. Ambedkar's famous statement in the Constituent Assembly during debates on the proposed codification of Hindu law: "The religious conceptions in this country are so vast that they cover every aspect of life from birth to death… There is nothing extraordinary in saying that we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend it beyond beliefs and such rituals as may be connected with ceremonials which are *essentially* religious (italics added)."[101]

With the adoption of the essential practices doctrine, the Supreme Court seems to have taken up this project in right earnest. Though appropriation of the role of interpreter of religious doctrine is most unusual for courts in secular constitutional polities, in the Indian context this role has been facilitated by the lack of a unitary ecclesiastical organization for Hinduism. This has given the opportunity, as Galanter points out, to the judiciary to embark on an "active reformulation of Hinduism under government auspices in the name of secularism and progress."[102] This leads the Court, especially the more activist judges, to insist on religion without, what the Court in its wisdom designates, as superstition and irrationality. This attitude comes through even in cases not strictly related to the freedom of religion clauses. For instance, in

[101] *Constituent Assembly Debates* VII, 781.
[102] Galanter, *Law and Society in Modern India*, 249.

Ziyauddin Bukhari v. Ramdass Mehra[103] — a case involving the application of Representation of People Act (Ambedkar was incidentally a key figure in this legislation too) — Justice Beg said, "We do not consider such (religious diatribe) speeches to have any place in a democratic set-up under our Constitution. Indeed they have none in the world of modern science which has compelled every type of religion, for its own survival, to seek surer foundations than child-like faith in and unquestioning conformity or obedience to an invariable set of religious beliefs and practices."[104]

However, it is important to note that while Amebdkar was an outspoken critic of traditional Hinduism, many of the Supreme Court judges approach Hinduism and indeed religion from a different angle. Many of the judges, unlike Ambedkar, were inspired by a Vedic rationalist Hinduism, a Hinduism purged of its alleged 'irrational' rituals and practices. This is apparent from the authorities that are cited in the Court's construction of Hinduism and Hindu practices. Some of the names that figure prominently in the judicial discourse are Vivekananda and Radhakrishnan — namely personalities identified with a reformist and universal Hinduism. Vivekananda's distaste for popular Hindu practices finds an echo in the Court rulings. For instance, this was what Vivekananda had to say about Hindu practices: "The fact is that we have many superstitions, many bad spots and sores on our body – these have to excised, cut off, and destroyed – but these do not destroy our religion, our national life, our spirituality. Every principle of religion is safe, and the sooner these black spots are

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[103] 2 SCC 1976, 17.
[104] Ibid., 28.

purged away, the better the principles will shine, the more gloriously."[105] The use of sacred texts by the Court to ascertain the legitimacy of a practice is similarly skewed towards the canonical, rationalist versions of high-culture texts such as the Vedas and Upanishads.

Apart from the interpretation of Hindu practices, it can be argued that the dominant figures of the Hindu reformation play a key role in the agenda of temple reform. Admittedly, corruption, embezzlement of funds and mismanagement of property were a major factor in the justification of state intervention in temple management. In addition, the experience during British rule of devolving temple management in the hands of semi-autonomous temple committees in Tamil Nadu had not been a happy one. But besides these administrative concerns, judges like Gajendragadkar and Ramaswamy speak in a language very similar to Sarvepalli Radhakrishnan and his idea of a 'pure' Hinduism. According to Radhakrishnan, "At the moment, however, temples present an air of dull acquiescence and tedious routine. To attempt to abolish temples, which are so passionately loved and affectionately revered, is vain. But we must improve the tone and the atmosphere... Worship in temples must be of the purest form."[106] Ramaswamy's idea of dharma as religion certainly definitely has overtones of Radhakrishnan.

If figures like Vivekananda and Radhakrishnan make frequent appearances in Court judgements, there are also some notable absences. This is perhaps best illustrated in the marginalization of Vivekananda's teacher and guru, Ramakrishna

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[105] Vivekananda, *Collected Works* III, 279.
[106] Radhakrishnan, *Religion and Society*, 125.

Paramahansa. Ramakrishna, who can be located in the Bhakti tradition and was characterized by mysticism and unreason (*pagal*), is a sharp contrast to his disciple Vivekananda, who established a Hindu monastic order to achieve social and religious reform. The contrast between these two figures is vividly expressed, as Sumit Sarkar has noted, in the Dakshineswar temple (where Ramakrishna lived for over 30 years) and the Belur Math founded by Vivekananda. Sarkar writes, "The temple [Dakshineswar], like any major Hindu sacred site, is thronged with crowds which cut across class divides, noisy, colorful, not over-sensitive to dirt... Belur Math is much more of an upper middle class devotional-cum-tourist spot: almost aggressively hygienic, it is full of guards and notices warning visitors from bathing in the river or spoiling the lawns."[107]

This study in contrast in a way admirably captures the approach of the Supreme Court and its essential practices doctrine. The essential practices doctrine can then be seen as the Court's attempt to discipline and cleanse religion or religious practices that are seen as unruly, irrational and backward. This has meant that the Court has systematically appealed for legitimation to authoritative figures associated with Vedic rationalism as well as to privilege canonical texts within this tradition. This has also meant that the Court has not only narrowed the "institutional space for personal faith"[108] but also marginalized popular religion by, in Ashis Nandy's words,

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[107] Sumit Sarkar, *An Exploration of the Ramakrishna Vivekananda Tradition* (Shimla: Indian Institute of Advanced Study, 1993), 66.

[108] Subrata Mitra, "Religion, Region and Identity: Sacred Beliefs and Secular Power in a Regional State Tradition of India," in Noel O'Sullivan ed., *Aspects of India: Essays on Indian Politics and Culture* (Delhi: Ajanta Publications, 1997), 91.

treating it as "parts of an enormous structure of irrationality and self-deceit, and as sure markers of an atavistic, regressive way of life."[109]

[109] Ashis Nandy, "The Twilight of Certitudes: Secularism, Hindu Nationalism and other masks of Deculturation," in Nandy, *Time Warps: Silent and Evasive Pasts in Indian Politics* (Delhi: Permanent Black, 2001).

CHAPTER IV

JUDGING RELIGION: A NEHRUVIAN IN COURT

In this chapter, I propose to examine the judicial discourse on religion by focusing on a former Chief Justice of the Supreme Court, Prahlad Balacharya Gajendragadkar (1901-1981). The obvious question is, why Gajendragadkar? The primary reason for choosing Gajendragadkar is that he authored several leading judgements on religion. It is fortunate that Gajendragadkar has left behind a substantial body of extra-judicial writings, mostly collections of lectures, as well as an autobiography. He was a judge during a period when the courts were for the first time interpreting many of the fundamental rights in the Indian Constitution. Gajendragadkar's rulings — not merely in the sphere of religion but in other areas of Constitutional interpretation — can be fruitfully analyzed as being inspired by what was for the early decades of independent India, the hegemonic Nehruvian world-view.

Some would argue that Gajendragadkar was uniquely fitted to decide matters related to Hindu religion. He belonged to a Brahmin family that for several generations had produced Sanskrit scholars. The chief justice's father, Balacharya Gajendragadkar, was a noted Sanskrit scholar who ran a *pathsala* at Satara in Maharashtra. The chief justice himself had performed exceedingly well in Sanskrit in the B.A. and M.A. exams before taking his law degree. But unlike his brothers, who

carried on the family tradition of teaching, Gajendragadkar decided to become a lawyer. After practicing in the appellate side of Bombay High Court from 1926, he was appointed a judge at the high court in 1945. Gajendragadkar was elevated to the Supreme Court in 1957 and served as Chief Justice for a little over two years – which was longer than average for a chief justice in India – from February 1964 to 1966. Gajendragadkar remained a public figure after retirement, holding several important posts, including chairman of the Law Commission of India during a tumultuous period from 1971 to 1977.

The combination of a Brahmin and Sanskrit scholar was not unusual in the Supreme Court. As Rajeev Dhavan has noted of the 55 judges appointed to the Supreme Court till 1975, 20 were Brahmins and six were Sanskrit scholars.[1] But what was unusual was the reformist zeal Gajendragadkar brought to his work both on and off the Bench. Besides his judgements, which sanctioned extensive state regulation of places of worship, arrogated responsibility to the Court for deciding essential religious practices and showed little sympathy for traditional authorities, Gajendragadkar was active in social reform. He was part of the movement that revived Justice M.G. Ranande's Social Reform Conference in Maharashtra. While a major portion of this chapter is devoted to Gajendragadkar's understanding of law and religion, I highlight the parallels between Jawaharlal Nehru and Gajendragadkar's views. Like Nehru, Gajendragadkar, it can be argued, believed in a "rational modern world-view in which

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[1] Rajeev Dhavan, *The Supreme Court of India* (Bombay: N.M. Tripathi Ltd., 1977), 24.

religion would play an increasingly residual role."[2] Gajendragadkar believed that "worship of reason was the guiding star of Nehru's life."[3] He was profoundly influenced by the Nehruvian vision of an "all-embracing and all-powerful Leviathan of state power and bureaucracy" radically transforming Indian society. Gajendragadkar's ideology was also closely allied with Nehru's "fervent belief in rationalism, humanism and secularism."[4]

By examining Gajendragadkar's court judgements as well as extra-judicial writings I focus on the role of the judge in determining the place of religion in the public realm. In determining the role of the judge I argue that though the personality and beliefs of the judge are of some importance, the court rulings must also be seen as a product of contemporary ideas and values. American jurist Benjamin Cardozo notably articulated this view: "[A] judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief... My own notion is that he would be under a duty to conform to the accepted standards of the community, the mores of the times."[5] Taking a somewhat different tack, Oliver Wendell Holmes in *The Common Law* compared the judge to a legislator, "It [the work of courts] is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the

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[2] Subrata K. Mitra, *Culture and Rationality: The Politics of Social Change in Post-Colonial India* (New Delhi: Sage Publications, 1999), 97.
[3] V.D. Mahajan ed., *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses* (Delhi: S. Chand, 1966), 337.
[4] Rajeev Dhavan, "Nehru, Law and Social Change," in Rajeev Dhavan and Thomas Paul eds., *Nehru and the Constitution* (Bombay: N.M. Tripathi Ltd., 1992), 49.
[5] Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1969), 108. Cardozo became a judge in 1914, serving 18 years on the New York Court of Appeals and six years on the US Supreme Court. He is best known for *The Judicial Process*, which is a classic in the field.

law draws all the juices of life. I mean, of course, considerations of what is considered expedient for the community."[6]

It must be mentioned here that this instrumentalist idea of law, which was developed by prominent American jurists such as Roscoe Pound, Holmes and Cardozo, considerably influenced Gajendragadkar. However, if one compares the two statements of Cardozo and Holmes a paradox becomes apparent: the mores of the day might well conflict with what is considered expedient for the community by the judges. This conflict can also be described as one between the reality of the Indian present and the legacy of the past against the radical changes sought to be wrought by the Nehruvian state. This conflict was a central theme of Gajendragadkar's philosophy both on and off the bench.

Evaluating the Judge

The role of the judge and the process of judicial decision-making are contentious issues in jurisprudence. This is more so in India where the judiciary possesses enormous powers to review all activities of the state, including the power to annul decisions of the Cabinet and Parliament. In fact, from the early days of the republic there has been considerable friction between the judiciary and the legislature. Nehru's disapproval of the judiciary's role in hindering land reform policies of the government is well known. The bone of contention was the power of judicial review conferred on the Supreme Court by the Constitution, which Nehru interpreted as limited. During the

[6] Max Lerner ed., *Mind and Faith of Justice Holmes* (Madras: Higginbothams, 1974), 36.

Constituent Assembly debates, Nehru declared, "No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community. If we go wrong here and there, it can point it out but in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way."[7]

However, as the history of independent India has shown the judiciary was not content to play a supine role. A legal scholar has even gone to the extent of describing the Supreme Court as "probably the only court in the history of humankind to have asserted the power of judicial review over amendments to the Constitution."[8] The confrontation between the judiciary on one hand and the executive and the legislature reached a flashpoint during Indira Gandhi's tenure in the years leading up to the Emergency (1975-77). *Kesavananda Bharati v. State of Kerala*,[9] where the Court said the legislature could not alter the 'basic structure' of the Constitution, remains one of the most debated judgements in India. According to the Rudolphs, *Kesavananda* "may prove to be India's *Marbury v. Madison* by accepting an acceptable ground for judicial review."[10] The constant friction between the Court and the executive provoked a Cabinet minister to proclaim in 1973 that only judges "committed" to the social

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[7] *Constituent Assembly Debates* IX, 1195.
[8] Upendra Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties* (Bombay: N.M. Tripathi Ltd., 1985), 64.
[9] AIR 1973 SC 1461. The eleven judges on the Constitution bench each gave separate opinions running into several hundred pages. For a summary of the arguments in the case see Surendra Malik ed., *The Fundamental Rights Case: The Critics Speak!* (Lucknow: Eastern Book Company, 1975). For a concise account of the political background to the case see Granville Austin, *Working a Democratic Constitution: a History of the Indian Experience* (New Delhi: Oxford University Press, 2003), ch. 11. For an analysis of the judgment see Rajeev Dhavan, *The Supreme Court and Parliamentary Sovereignty* (New Delhi: Sterling Publishers, 1976).
[10] Lloyd I. Rudolph and Susanne Hoeber Rudolph, *In Pursuit of Lakshmi: The Political Economy of the Indian State* (Bombay: Orient Longman, 1987), 110.

philosophy of the Constitution should be appointed.[11] The same year Indira Gandhi's government broke with the practice of seniority in appointing the Chief Justice of India creating a fresh set of controversies. It is no surprise then that the Supreme Court is seen as a major actor in the political process.

Michael Perry argues that the law versus politics dichotomy, especially in the context of constitutional adjudication, is not tenable. Instead he believes it is proper to regard constitutional adjudication as "neither just law nor just politics." He writes, "The polemical disjunction between 'law or politics' obscures the fact that constitutional adjudication, at its best, is both law and politics."[12] The debate about law and politics usually boils down to whether the judges merely "apply" law or also "make" law when necessary. Baxi contends that in the Indian context this debate is no longer meaningful: "[T]he question is not any longer whether or not judges make law. Rather the questions are: what *kind* of law, how *much* of it, in what *manner*, within which self-imposed *limits* and to what *willed results* and with what tolerable accumulation of unintended results, may the judge make law?"[13]

In spite of the judiciary playing a central role in the political process, Dhavan comments that there is precious little knowledge in the public domain about Indian judges. While there have been evaluations, mostly panegyrics, of individual judges

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[11] Mohan Kumaramangalam, *Judicial Appointments* (New Delhi: IBH, 1973). Kumaramangalam argues, "At every stage in the history of any country when appointment to the highest judicial office was under consideration, the appointing authority has always taken into account the tasks that faced the country, the direction in which the country wished to go, the 'spirit of the times'." Kumaramangalam, 38.

[12] Michael J. Perry, *The Constitution in the Courts: Law or Politics* (New York: Oxford University Press, 1994), 204.

[13] Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*, 3.

there has been little work on the ideology of Indian judges and on locating their rulings in the context of prevailing ideas and values. As George Gadbois — one of the few scholars who has done empirical work on judicial decision making in Indian courts — has noted this was perhaps because many Indian legal scholars are Blackstonians who are loath to treat the Court as a political institution.[14]

The Indian judges themselves are also wary of articulating a more nuanced view of their role. A majority of the judges, according to S.P. Sathe, continues to "think that judicial decisions are taken without regard to their social and political context... The dilemma is regarding their role. They cannot give up the influence of the black letter law tradition and at the same time refuse to play a wider role in the political economy."[15] An unusually candid admission of the role of the judge in legal decisions was made by Chief Justice Y.V. Chandrachud while delivering a judgment: "Perplexed by a bewildering mass of irreconcilable dogmas, courts have adopted and applied to cases which come before them rules which reflect their own value judgements, making it increasingly difficult to define with precision the extent to which one may look beyond the actual words used by the legislature, for discovering the true legislative purpose or intent."[16]

Dhavan has provided a corrective to this 'black letter' tradition by pointing to the importance of ideology in analyzing the judiciary. He concludes his essay on

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[14] George H. Gadbois, "The Supreme Court of India as a Political Institution," in Rajeev Dhavan, R. Sudarshan and Salman Khurshid eds., *Judges and the Judicial Power* (Bombay: N.M. Tripathi Ltd., 1985), 261.
[15] S.P. Sathe. *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2003), lxxx.
[16] *Union of India v. Sankalchand Himatlal Sheth*, AIR 1977 SC 2336.

"judging the judges" by saying, "[L]aw is not just process. It is also overtly ideological in nature. It articulates an ideology both for itself and society."[17] He uses ideology in three distinct senses. The first is ideology as 'rhetoric' which is "designed to inspire general faith and elicit consent."[18] The second is what Dhavan terms 'constitutive' ideology which refers to the "way in which social life and processes are described."[19] The third and most important is 'conceptive' ideology, the process of reasoning by which legal and social reality are "constituted and held together."[20] Baxi, too, stresses, "No meaningful discussion concerning judicial role is thus possible without a grasp of ideologies on the one hand and the organization of relations of force in societies on the other."[21] What Dhavan and Baxi are articulating is a major theme in 20th century jurisprudence: the displacement of the idea of law as a "body of immutable principles" by an emphasis on the role of the judge and the influence of values and ideology on judicial decision making. These prefatory remarks about the shift in jurisprudence from a universal to a contingent conception of law and the link between the courts and politics provide a framework to discuss the role of a reformist judge like Gajendragadkar.

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[17] Rajeev Dhavan, "Judging the Judges," in Rajeev Dhavan, R. Sudarshan and Salman Khurshid eds., *Judges and the Judicial Power*, 27.
[18] Ibid., 27.
[19] Ibid., 27.
[20] Ibid., 27.
[21] Baxi, *Courage, Craft and Contention: The Indian Supreme Court in the Eighties*, 4.

The Role of Law

In several of his lectures, Gajendragadkar expresses his intellectual debt to the proponents of instrumental or functional jurisprudence, primarily Roscoe Pound.[22] Gajendragadkar admits he was deeply influenced by Pound: "Dean Pound is justly regarded as the principal exponent of the Sociological Schools of Jurisprudence. By his lucid writing he has contributed to the development of the theory of law to such an extent that all of us who believe in the significance of the functional jurisprudence of law regarded him as their guru."[23] Oliver Wendell Holmes[24] was another jurist Gajendragadgar greatly admired. Gajendragadkar refers to Holmes as a "shining example" of a judge who paid particular attention to social interests but did not allow his own philosophy to dictate his judgements.[25]

Pound, along with Holmes, is regarded as "having laid the foundation for the twentieth-century transformation of American legal thought."[26] In tracing the history of the philosophy of law, Pound wrote that in the latter part of the nineteenth century law was seen as "an evil, even if a necessary evil, that there should be as little law made as possible, since all law involved restraint upon free exertion of the will, and hence the jurist and legislator be content to leave things legal as they are and allow the

[22] Roscoe Pound was appointed to the Nebraska Supreme Court in 1901 and served until 1903. In 1910, Pound was appointed professor of law at Harvard, where he stayed till 1947. His most famous essay, "The Scope and Purpose of Sociological Jurisprudence," was published in the *Harvard Law Review* in 1911.

[23] P.B. Gajendragadkar, *Law, Liberty and Social Justice* (Bombay: Asia Publishing, 1965), 24.

[24] Oliver Wendell Holmes' classic, *The Common Law*, was published in 1881 when he was practising at the Bar and lecturing part-time at Harvard. In 1882, he joined Harvard as a professor of law. But after having taught one term, Holmes was appointed to the Supreme Judicial Court of Massachusetts. He was elevated to the US Supreme Court in 1902 and served for 30 years.

[25] Gajendragadkar, *Law, Liberty and Social Justice*, 12.

[26] Bernard Schwartz, *Main Currents in American Legal Thought* (Durham: Carolina Academic Press, 1993), 467.

individual 'to work out in freedom his own happiness or misery' on that basis."[27] At this stage of development of the idea of law, it existed to "promote or permit the maximum of free individual self-assertion had been reached, the juristic possibilities of the conception had been exhausted."[28] At the beginning of the twentieth century, according to Pound, "Jurists began to think in terms of human wants or desires rather than of human wills… They began to think of the end of law not as a maximum of self-assertion, but as a maximum satisfaction of wants."[29]

This was the foundation of Pound's formulation of law as a process of "social engineering," an idea that profoundly influenced Gajendragadkar. Pound stated: "[I] am content to see in legal history the record of a continually wider recognizing and satisfying of human wants and claims or desires through social control, a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence — in short, a continually more efficacious social engineering."[30] This would represent a marked shift in jurisprudence from laissez faire towards social welfare legislation and the welfare state. At the same time, Pound was aware of the limits of law in effecting social change. He warned against "attempts to govern by means of law things which in their nature do not admit to objective treatment and external coercion."[31]

According to Gajendragadkar, the Sociological School of Jurisprudence interpreted law as an "institution devised by human agency in order to resolve the

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[27] Roscoe Pound, *Introduction to Philosophy of Law* (New Haven: Yale University Press, 1954), 86.
[28] Ibid., 87.
[29] Ibid., 89.
[30] Ibid., 99.
[31] Schwartz, *Main Currents in American Legal Thought*, 472.

social and economic conflicts." The law, as interpreted by this school, was above all a "flexible instrument for social and economic change"[32] and a "specialized agency for social control."[33] In keeping with this idea, Gajendragadkar outlined the function of law in a passionate address to the Satara District Bar Association: "The law, in its majesty, is being used as a mighty weapon of democracy to bring the country nearer to the millennium — the social and economic justice to the millions who are seething with poverty and ignorance."[34] In another lecture, he described law as a "mighty weapon in the hands of democratic legislatures in India to achieve socio-economic justice."[35] Such was Gajendragadkar's enthusiasm for the sociological school of law that he felt that the idea of *dharma* — understood as the source of sustenance of the social order — was compatible with the functional conception of law.

Socio-economic justice was the lodestar of Gajendragadkar and he believed that the modern welfare state was the best vehicle to achieve the goal of equality. "This Welfare State, in response to the challenge of totalitarian ideology, assures to the citizen socio-economic equality."[36] However, Gajendragadkar makes it clear that the welfare state demands that "individual liberty and freedom must be reconciled to the public, social good."[37] He states, "The fundamental concept of democracy requires that individual liberty must be sustained and every citizen must be given full freedom to develop his personality in the manner which he regards as reasonable. Freedom of

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[32] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 85.
[33] Gajendragadkar, *Law, Liberty and Social Justice*, 49.
[34] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 90.
[35] Ibid., 158.
[36] Ibid., 91.
[37] Ibid., 91.

property and freedom of contract like freedom of speech and religion must also be guaranteed but if ever public good requires that these freedoms should be regulated, the welfare democracy does not hesitate to undertake the task of introducing such legislation."[38]

In the quest to achieve "socio-economic justice," Gajendragadkar privileged the "public good" over "individual liberty and freedom." He said, "[I]f ever a dualism arose, if a conflict arose between the individual liberty and freedom on the one hand, and public good on the other, then democracy swears that individual liberty will have to yield to the public good."[39] Gajendragadkar viewed the welfare state founded on a rule of law as the vehicle for finding a "harmonious synthesis between the competing claims of individual liberty and public good"[40] and delivering justice to the Indian citizens: "Law is not only a passive instrument, law is a dynamic weapon, law is the only weapon with which our democratic Governments seek to usher in India that glorious stage, which is called a Welfare State."[41]

In contrast to the exalted role of law in transforming Indian society, Gajendragadkar had a more limited idea of the role of the judge: "Everyone, Judges included, has his own socio-economic philosophy. But a wise Judge must constantly endeavor to be on the look out to see to it that sub-conscious pull or pressure of his socio-economic philosophy does not trespass into his judicial decisions."[42] In his autobiography, Gajendragadkar writes that a "judge must inevitably choose to be a

[38] Ibid., 158.
[39] Ibid., 91.
[40] Ibid., 158.
[41] Ibid., 167.
[42] Ibid., 140.

little aloof and isolated from the community at large."[43] However, he was aware that a judge cannot be "completely neutral or oblivious to considerations of policy" since policy implications "inevitably enter [a] judicial verdict when dealing with questions of fundamental rights."[44]

The constant attempt by Gajendragadkar to place the judge above the "pulls" and "pressures" of his own ideology while at the same time advocating social engineering presents a paradox. However, what allowed Gajendragadkar to justify the use of law as a tool of social change was his firm belief in the Nehruvian welfare state and its historic role in achieving social and economic equality. This faith in the welfare state and the universal values embodied by it would allow Gajendragadkar to justify judicial activism. The goal of achieving "public good," according to Gajendragadkar, gives the state the license to intervene in all spheres of life, including religion. This faith in a common good, as the American political theorist, Judith Shklar, notes, has been a strong influence on legal thinking in the twentieth century. "The belief in an objective common good has remained very powerful, and this is not surprising," writes Shklar. "It certainly makes the responsibility of deciding less onerous if one can believe that there are prefabricated rules waiting to be recognized and followed in legislation."[45]

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[43] P.B. Gajendragadkar, *To The Best of my Memory* (Bombay: Bharatiya Vidya Bhavan, 1983), 349.
[44] Gajendragadkar, *Law, Liberty and Social Justice*, 13.
[45] Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), 88.

Constitutional Adjudication

As a firm believer in the welfare state, Gajendragadkar was more likely than not to favor the state over the interests of the individual. As mentioned earlier, Gajendragadkar had no doubt that if there was a conflict of interest between the state, representing the "public good," and the individual, the former must prevail. Hence, P.K. Tripathi comments about Gajendragadkar, "[H]is lordship's opinions generally evince an unfailing awareness of the fact that legislators and the administrators have to take decisions and exercise discretion in difficult and often delicate circumstances in which personal views as to what is right or desirable may reasonably differ. And, by and large, his approach has been characterized by a concern for avoiding embarrassment and extending accommodation to those exercising power in good faith."[46]

In the major cases on religious freedom decided by Gajendragadkar, challenges to state legislation regulating religious institutions were dismissed. There were, of course, rulings in other spheres where Gajendragadkar did overrule state legislation. For instance, in *M.R. Balaji v. State of Mysore*[47] Gajendragadkar held that the order of the Mysore government reserving 68 per cent of the seats in certain educational institutions for "backward" and "more backward" classes was unconstitutional. But Gajendragadkar's overall approach was in favor of the state and its reformist impulses. This approach, best exemplified in Gajendragadkar's opinions on the power of judicial

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[46] P.K. Tripathi, "Mr. Justice Gajendragadkar and Constitutional Interpretation," in *Journal of The Indian Law Institute* 8:2 (1966), 496.
[47] AIR 1963 SC 649.

review, was closely allied to Nehru's views on the critical role of the Constitution in ushering a "social revolution."

Nehru's confrontation with the judiciary over the socialist policies of the Congress government was an important theme in the first decade of Indian independence. Shortly after the Constitution was adopted, the major plank of the socialist policy of the Congress government – land reform legislation – was short-circuited by the courts. In 1951, the Patna High Court struck down the Bihar Land Reform Act on the ground that different rates of compensation for the affected zamindars violated Article 14, which guaranteed equality before the law. The same year the Calcutta High Court ruled against the state government in a case where land had been acquired to build a shelter for refugees. The court ruled that the landowner's right under Article 31, which governed state acquisition of property, had been violated because the compensation for the land was not equal to market value of the land. An alarmed Nehru and the Congress party reacted by inserting Article 31A in the Constitution which stipulated that nothing in the Fundamental Rights could be used to strike down laws for the appropriation of property. The most important component of the First Amendment was, however, Article 31(b) which established the Ninth Schedule into which legislation could be put and made immune from judicial review. During the Parliamentary debate on the amendment, Nehru made the oft-quoted statement on the regressive nature of the judiciary: "[W]e have found this magnificent Constitution … was later kidnapped and purloined by the lawyers."[48] Shortly after the

[48] *Parliamentary Debates* 12, 16 May 1951.

amendment was passed by Parliament, it was challenged in *Shankari Prasad v. Union of India*[49] on the grounds that Article 368,[50] which dealt with the procedure to amend the Constitution, and Article 13(2),[51] which stipulated that no law can abridge Fundamental Rights, had been violated. The Supreme Court, however, upheld the validity of the amendment saying Parliament had unlimited power of amendment.

Gajendragadkar entered this contentious debate on the legislature's right to amend the Constitution in 1965 with his verdict in *Sajjan Singh v. State of Rajasthan*[52]. In this case the Constitution (Seventeenth Amendment) Act, 1964, was challenged primarily on the grounds that it contravened Article 368. Writing for the Court, Gajendragadkar ruled that the power to amend the Constitution conferred by Art. 368 includes even power to take away fundamental rights under Part III.[53] The Court also ruled that Article 13(2) did not affect amendments to the Constitution since there is a clear demarcation between ordinary law and constitutional law which is made in exercise of constituent power.[54] Gajendragadkar wrote: "The Constitution-makers must have anticipated that in dealing with socio-economic problems which legislatures may have to face from time to time, the concepts of public interest and

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[49] AIR 1951 SC 458.

[50] The original Article 368 stated: An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill the Constitution shall stand amended in accordance with the Bill...

[51] Article 13(2) states: The State shall not make any law which takes away or abridges the right conferred by this Part and any law made in contravention of this clause, shall to the extent of the contravention, be void.

[52] AIR 1965 SC 845.

[53] Ibid., 854.

[54] Ibid., 856.

other important considerations... may change and even expand; and so it is legitimate to assume that the Constitution-makers knew that parliament should be competent to make the amendments in these rights so as to meet the challenge of the problems which may arise in the cause of socio-economic progress and development of the country."[55] Gajendragadkar explained in a subsequent lecture that he drew on Oliver Wendell Holmes' observation about the American Constitution, "When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."[56]

Gajendragadkar's ruling would echo Nehru's opinions on the Constitution expressed in the Constituent Assembly and the debates on the First Amendment. During the Constituent Assembly debates, Nehru said, "A Constitution if it is out of touch with the peoples' life, aims and aspirations becomes rather empty... Therefore, while we make a Constitution which is sound and basic as we can, it should also be flexible and for a period we should be in a position to change it with relative facility."[57] The adaptability of Constitution would again be stressed by Nehru in Parliament: "A Constitution to be living must be growing; must be adaptable; must be flexible; must be changeable... Therefore, it is a desirable and a good thing for people to realize that this very fine Constitution that we have fashioned after years of labour

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[55] Ibid., 858.
[56] Holmes quoted in P.B. Gajendragadkar, *Indian Parliament and Fundamental Rights* (Calcutta: Eastern Law House, 1972), 159.
[57] *Constituent Assembly Debates* VII, 323.

is good in so far as it goes but as society changes, as conditions change we amend it in the proper way."[58]

Though *Sajjan Singh* and *Shankari Prasad* had upheld the Nehru doctrine, an eleven-judge bench in the famous *Golak Nath*[59] case in 1967 in a 6-5 decision reversed the earlier rulings. Significantly, in *Golak Nath* speaking for the majority Chief Justice K. Subba Rao specified limitations on Parliament's power to amend the Constitution. Subba Rao ruled that the Fundamental Rights were "given a transcendental position under our Constitution and are kept beyond the reach of the Parliament."[60] Gajendragadkar, in keeping with the Nehruvian line of thinking, disagreed with the *Golak Nath* judgment. In his Tagore law lectures, Gajendragadkar explained, "The constitutional prohibition against taking away or abridgement of Fundamental Rights as well as the consequences of contravention of the said prohibition prescribed by Article 13(2) do not apply to the amendments made by Parliament by virtue of the constituent power conferred on it by Article 368, even though the said amendments may lead to the abridgement of Fundamental Rights."[61]

This clear statement in favor of Parliament's right to infringe Fundamental Rights to further "socio-economic progress of the country" would give way to some misgivings in the post-Nehruvian era. Gajendragadkar felt Parliament was justified in passing the Twenty Fourth Amendment — the first of the "radical" amendments as

[58] *Parliamentary Debates* 13, 2 June 1951.
[59] *Golak Nath v. State of Punjab*, AIR 1967 SC 1643.
[60] AIR 1967 SC 1656
[61] Gajendragadkar, *Indian Parliament and Fundamental Rights*, 180.

Granville Austin terms it — which amended Articles 13 and 368[62] in 1971. Gajendragadkar said, "In plain terms, by passing this Act, Parliament has declared unambiguously and clearly that so far as it is concerned, the interpretation placed on Articles 368 and Article 13(2) by the Supreme Court in Sri Sankari Prasad's case and reaffirmed by the majority decision in Sajjan Singh's case was the correct interpretation of these two articles."[63] But when it came to the Twenty Fifth Amendment, which inserted Article 31C declaring that state policy meant to secure the Directive Principles in Article 39(b) and (c)[64] could not be invalidated on the ground that it violated the Fundamental Rights, Gajendragadkar was decidedly ambivalent.

In the Tagore law lectures published in 1972, Gajendragadkar said, "It is plain that the substantive provision introduced by the first part of Article 31C marks the beginning of a new era in the constitutional and political history of our country. It recognizes the primacy of two important economic principles enshrined in Article 39(b) and (c), and enables the legislatures to give effect to them by appropriate legislation..."[65] However, the Law Commission, of which Gajendragadkar was chairman, published a report in 1971 opposing parts of the Twenty Fifth Amendment. It was especially critical of the clause in Article 31C putting a law giving effect to the

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[62] The Twenty Fourth Amendment put Constitutional amendments outside the purview of Article 13(2). It also conferred on Parliament the right to amend any part of the Constitution "by way of addition, variation or repeal."

[63] Gajendragadkar, *Indian Parliament and Fundamental Rights*, 181.

[64] Article 39: The State shall, in particular, direct its policy towards securing — (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

[65] Gajendragadkar, *Indian Parliament and Fundamental Rights*, 199.

Directive Principles as beyond challenge in court. In fact, Gajendragadkar took the unusual step of writing to Indira Gandhi about his misgivings on Article 31C.[66]

In the aftermath of the darkest period for Indian democracy — the Emergency declared by the Indira Gandhi government on 26 June 1975 — Gajendragadkar's misgivings about Constitutional amendments would heighten. When the ground was being prepared for the infamous Forty Second Amendment,[67] Gajendragadkar wrote to Indira Gandhi that though amendments were necessary the "adoption of extremist doctrinaire positions is irrelevant and inadvisable."[68] In the post-Emergency period, Gajendragadkar would write that the "most objectionable" part of the Forty Second Amendment was putting Constitutional amendments beyond the pale of the courts. However, the vicissitudes of the Indira Gandhi period did not entirely shake Gajendragadkar's faith in the ability of the legislature to truly represent and work for the common good. In his autobiography, which was published in 1983 after his death, Gajendragadkar in one of the final pages quoted one of his favorite passages from Cardozo: "My duty as a judge may be to objectify in law not my own aspirations, convictions and philosophies but the aspirations and convictions and philosophies of men and women of my time."[69] He then went on to add that it was to these "aspirations, convictions and philosophies to which the legislature seeks to give effect

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[66] Letter dated 18 October 1971. Gajendragadkar Papers, Nehru Memorial Museum Library.

[67] The amendment was signed by the President on 18 December 1976. The Rudolphs write, "The amendment purported inter alia to undo Kesavananda by barring the court from reviewing parliamentary legislation, declaring that 'there shall be no limitation whatsoever on the constituent power of parliament to amend' the constitution. The 'amendment' limited the court's authority in a number of ways and added provisions that vastly strengthened the executive." Rudolphs, 115. On the Forty Second Amendment, also see Rajeev Dhavan, *The Amendment: Conspiracy or Revolution?* (Allahabad: Wheeler Publishing, 1978).

[68] Letter dated 13 August 1975. Gajendragadkar Papers, Nehru Memorial Museum Library.

[69] Cardozo quoted in Gajendragadkar, *To The Best of my Memory*, 355.

by appropriate legislation."[70] It was this impulse — framed within the Nehruvian discourse on rationalism, humanism and secularism — that Gajendragadkar sought to incorporate in his rulings on religion. Gajendragadkar's faith in the legislature effecting changes in social structures would find expression in his views on religion.

Religion through Rationalist Lens

Gajendragadkar authored several leading judgements on religion, the most important of which have been discussed in chapter 2. In this section I primarily focus on Gajendragadkar's writings and lectures on religion. It is important to stress that Gajendragadkar looked at religion through the rational and scientific lens so often used by Nehru. The congruence between Gajendragadkar's and Nehru's world view was particularly strong when it came to religion. On several occasions, Gajendragadkar and Nehru expressed their strong distaste for popular religious practices and rituals. While Gajendragadkar has spoken and written extensively about religion there is not much in his prolific output on any intimate religious experience. It is ironical that a metaphor favored by Gajendragadkar was the comparison of the court room to a temple. Like Nehru, who famously referred to dams as "temples of modern India," to Gajendragadkar the court was a "temple of justice."

The description by Gajendragadkar and Nehru of their visits to a major Hindu temple on separate occasions makes for interesting reading. While delivering the Feroze Gandhi Memorial Lecture in 1964, the chief justice admitted, "[I] am not much

[70] Ibid., 355.

of a religious man myself, but there is a feeling in my mind that for the last twenty years that I have been on the Bench, that everyday when I go to the Court, I am entering a temple of justice."[71] However, Gajendragadkar did write about his experience when visiting one of the most famous shrines in India. "In the Courts of Law, therefore, the atmosphere must be serene — an atmosphere which I witnessed in the temple of Lord Venkateswara, where I experienced a serenity, a sort of spiritual bliss, though momentary and felt there is a certain invisible force — ethical force."[72] For Gajendragadkar the "moment" of spiritual bliss experienced at Tirupati represented the epitome of religious experience.

Nehru's recollections of the equally famous Meenakshi temple in Madurai was altogether less positive. He wrote of his experience in a letter to Indira Gandhi: "I realized in this vast temple with its innumerable corridors and inner chambers, faintly lighted up, the great psychological influence of these religious edifices. How they must impress and rather frighten the multitudes and increase the power of the priesthood... There are not many people who can resist this numbing effect."[73] If even the fleeting moment of spiritual bliss was absent in Nehru's visit to the temple it was because of his antipathy towards any form of institutionalized religion. In fact, the only religion that appealed to Nehru, like Gajendragadkar, was some kind of an "ethical approach to life" and "spirituality."

In his lectures on secularism Gajendragadkar quotes Nehru from *Discovery of India* to lay the foundation of his own exposition on religion. Nehru writes about a

[71] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 145.
[72] Ibid., 87.
[73] Sarvepalli Gopal ed., *Jawaharlal Nehru: An Anthology* (Delhi: Oxford University Press, 1980), 616.

"sense of mysteries, of unknown depths," and observes, "The urge to understand it in so far as I can, comes to me; to be in tune with it and to experience it in its fullness. But the way to that understanding seems to me essentially the way of science, the way of objective approach, though I realize that there can be no such thing as true objectiveness. If the subjective element is unavoidable and inevitable, it should be conditioned as far as possible by the scientific method."[74]

In his autobiography, Nehru defines religion as the "inner development of the individual, the evolution of his consciousness in a certain direction which is considered good."[75] Nehru elaborates in *Discovery of India* that he does not believe in a personal God and that he is "incapable of thinking of a deity or of any unknown supreme power in anthropomorphic terms, and the fact that many people think so is continually a source of surprise."[76] He goes on to strongly indict religion in a well-known passage:

> Religions have helped greatly in the development of humanity. They have laid down values and standards and have pointed out principles for the guidance of human life. But with all the good they have done, they have also tried to imprison truth to set forms and dogmas, and encouraged ceremonials and practices which soon lose all their original meaning and become mere routine… The belief in a supernatural agency which ordains everything has led to a certain irresponsibility on the social plane, and emotion and sentimentality have taken the place of reasoned thought and inquiry. Religion though it has brought comfort to innumerable human beings and stabilized society by its values, has checked the tendency to change and progress inherent in human society.[77]

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[74] Ibid., 482.
[75] Jawaharlal Nehru, *An Autobiography* (Delhi: Oxford University Press, 1980), 379.
[76] Gopal, *Jawaharlal Nehru: An Anthology*, 482.
[77] Jawaharlal Nehru, *The Discovery of India* (New Delhi: Oxford University Press, 1989), 511.

In a similar vein, Nehru writes in his autobiography, "The spectacle of what is called religion, or at any rate organized religion, in India and elsewhere has filled me with horror… Almost always it seems to stand for blind belief and reaction, dogma and bigotry, superstition and exploitation, and the preservation of vested interests."[78]

Nehru contrasts religion, which is based on intuition and emotion, to the methods of science and scientific temper, which is based on positive knowledge and objective knowledge. Nehru writes, "Organized religion, allying itself to theology and often more concerned with its vested interests than with things of the spirit, encourages a temper which is the very opposite to that of science. It produces narrowness and intolerance, credulity and superstition, emotionalism and irrationalism."[79] Nehru believed the conflict between "true religion" and science could be resolved but for that "religion must put on the garb of science and approach all its problems in the spirit of science."[80] Nehru was certain that with the advance of "knowledge," the domain of religion would gradually "shrink." Nehru's prescription for the Indian nation was in keeping with this rationalist approach: "[W]ith the temper and approach of science, allied to philosophy, and with reverence for all that lies beyond, that we must face life."[81]

Gajendragadkar's diagnosis of religion in the Indian context was strongly shaped by Nehruvian rationalism. Gajendragadkar writes, "Indian society, by and large, is still traditional. It leans on scripture rather than on reason. It looks backward

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[78] Nehru, *An Autobiography*, 374.
[79] Nehru, *The Discovery of India*, 513.
[80] Gopal, *Jawaharlal Nehru: An Anthology*, 444.
[81] Nehru, *The Discovery of India*, 514.

rather than forward and its behavioral pattern is founded more on scriptures, beliefs and superstitions rather than on reason, experience, and principles of modernism."[82] It is not surprising that Gajendragadkar had no patience for popular religious practices. According to him, "Religion as it is actually practiced among the Hindu masses, tends to be reactionary in its outlook and seeks to perpetrate the distinctions between castes and communities and sustain social inequality in all its nakedness."[83] These statements have more than a passing resemblance to Nehru's views on religious practice: "[R]eligion as I saw it practiced, and accepted even by thinking minds, whether it was Hinduism or Islam or Buddhism or Christianity did not attract me… it seemed closely associated with superstitious practices and dogmatic beliefs; and behind it lay a method of approach to life's problems which was certainly not that of science."[84]

For Gajendragadkar 'true' religion and ethics are primarily concerned with "metaphysical speculations."[85] From this follows a crucial assumption about the privatization of religion: "The religion of man is a matter between him and his Creator; it should not intrude in the discussion or solution of socio-economic problems."[86] Gajendragadkar uses even stronger language in another lecture to describe religion as "totally irrelevant in the consideration of social, economic and political problems."[87] According to Gajendragadkar, the irrelevance of religion in the public realm was shared by Nehru. Gajendragadkar observes it was Nehru's firm

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[82] P.B. Gajendragadkar, *The Philosophy of National Integration* (Delhi: National Publishing House, 1974), 35.
[83] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 101.
[84] Gopal, *Jawaharlal Nehru: An Anthology*, 479.
[85] Gajendragadkar, *Secularism and the Constitution of India*, 90.
[86] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 101.
[87] Gajendragadkar, *The Philosophy of National Integration*, 39.

belief that a "citizen's religion is his own private affair" but at the same time a "citizen's religion cannot intrude in the discussion or decision of socio-economic issues."[88]

To combat the 'backward' and 'reactionary' elements of religion Gajendragadkar viewed secularism and the secular state as indispensable. According to Gajendragadkar, "Social Justice has to face the challenge of superstition, ignorance and misconceived notions of religion… In meeting this challenge, the basic tenet of social justice is secularism."[89] Gajendragadkar clearly lays out his vision of secularism in the following manner: "Secularism, I would like to repeat, which is contemplated by the Indian Constitution, is not anti-God or anti-religion. It recognizes that religion has relevance and validity in the lives of many, though not necessarily all, citizens; but it emphasizes that while religion may be relevant in life, it cannot stall, hamper or frustrate the progress of Indian democracy in its allotted task of creating a new secular order."[90]

The first part of Gajendragadkar's definition of the secular state — as not being anti-religion or anti-God — is an essential component of Nehru's definition: "A secular state does not mean an irreligious state: it only means that we respect and honour all religions giving them freedom to function."[91] On another occasion, Nehru defines a secular state as one where there is "free play for all religions, subject only to

[88] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 338.
[89] Ibid., 100.
[90] Gajendragadkar, *Secularism and the Constitution of India*, 83.
[91] *Jawaharlal Nehru's Speeches* V (New Delhi: Publications Division, Ministry of Information and Broadcasting, Government of India), 59.

their not interfering with each other or with the basic conceptions of our state."[92] However, it is important to note that even the second part of Gajendragadkar's definition — the link between secularism and progressive democracy — is present in Nehru's conception of secularism. Nehru says, "The word 'secular', however, conveys something much more to me, although that might not be its dictionary meaning. It conveys the idea of social and political equality."[93]

Though Gajendragadkar held that secularism is not anti-religion his predilection for a rationalized and private religion is quite clear in the way he views the Constitutional provisions regarding freedom of religion. Gajendragadkar writes, "The Indian concept of secularism recognizes the relevance and validity of religion in life, but seeks to establish a rational synthesis between the legitimate functions of religion and the legitimate and expanding functions of the state."[94] The "rational synthesis" that Gajendragadkar talks about is, however, weighted in favor of the restrictions on freedom of religion. Thus, Gajendragadkar states: "If you want to search for freedom of religion, you would emphasize the breadth and width of the guarantee enshrined in Articles 25 and 26. If you are looking for the doctrine of secularism, dedicated to the cause of a new social order, founded on justice, social, economic and political, you would emphasize the limitations imposed upon the exercise of the right to freedom of religion."[95]

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[92] Gopal, *Jawaharlal Nehru: An Anthology*, 327.
[93] Ibid., 327.
[94] Gajendragadkar, *Secularism and the Constitution of India*, 52.
[95] Ibid., 83-84.

The emphasis on the restrictions on religion stems from Gajendragadkar's belief in a secular social order based on science and reason. This is quite clearly expressed in a remarkable passage in Gajendragadkar's treatise on secularism.

> In other words, Indian society must adopt a rational and scientific way of life. It must not look behind, but must look forward. It must not look inward, but must look outward. It must not depend on texts or scriptures or authority of respected persons, priests or leaders of public opinion. It must depend upon reason... Whereas traditionalism makes a community static, conservative and averse to change, education must attempt to convert the traditional community into a modern, progressive and dynamic community which will be responsive to all changes dictated by reason. Faith in reason and not in dogma should be the guiding principle of the secular society.[96]

The dilemma for Gajendragadkar, and indeed any rationalist, is how to accommodate religion in a social order founded on reason. Drawing inspiration from a liberal position that religion in the "best sense" is an ethical philosophy, Gajendragadkar advocates a religion that has little connection with the experience of religion: "I have also attempted to show that when I am referring to the relevance of religion in the context of a modern secular state, I am not referring to religion as it is organized in the traditional way or as it is preached from the pulpit or platform by ignorant traditionalists, priests, pundits or kazis. I am referring to religion in the abstract, which is engaged in the quest of the Unknown and the Unseen, and which seeks for eternal verities and as such is the source and inspiration of true ethics and morality."[97]

The dichotomy between popular religion — which is marked by irrationality, superstition and tradition — and a higher, scientific and rational religion is a

[96] Ibid., 86.
[97] Ibid., 98.

distinguishing characteristic of Gajendragadkar's writing. This dichotomy would be underscored in Gajendragadkar's important rulings such as *Durgah Committee*, *Govindlalji* and *Yagnapurushdasji.* In *Durgah Committee*, Gajendragadkar issued a "note of caution," distinguishing between religion and superstition, that would recur in several subsequent judgements on religion: "[E]ven practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself."[98] Again in *Govindlalji*, Gajendragadkar introduced the rationality test. He wrote, "A claim made by a citizen that a purely secular matter amounts to a religious practice, or a similar claim made on behalf of the denomination that a purely secular matter is an affair in matters of religion, may have to be rejected on the ground that it is based on irrational considerations."[99]

Finally, in what was possibly his last judgment as Chief Justice of India, Gajendragadkar in *Yagnapurushdasji* dismissed the case made by the Satsangis as "founded on superstition, ignorance and complete misunderstanding of the true teachings of Hindu religion."[100] More importantly, Gajendragadkar expressed the conviction that the Indian Constitution had ushered a revolution in social attitudes and beliefs: "[T]he whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution."[101]

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[98] AIR 1961 SC 1415.
[99] AIR 1963 SC 1661.
[100] AIR 1966 SC 1135
[101] Ibid., 1135.

Rationalizing Personal Law

The reformist streak in Gajendragadkar would manifest itself on issues related to Hindu personal law. Gajendragadkar's views on Hindu law bring to the fore the question of how the courts should ascertain, to use Cardozo's words, what were the "accepted standards" of the Hindu community. Though Gajendragadkar maintained with regard to Hindu law that it can "never be the function of judges to change the law," an examination of his writings and rulings show that this 'neutrality' was unworkable. This becomes most apparent when Gajendragadkar approves of some popular customs as 'acceptable' by prevalent norms while he discards other popular practices as out of step with contemporary society. What is also noteworthy is an appeal to the 'correct' interpretation of the scriptures — though Gajendragadkar consistently maintained that sacred texts or scriptures had no place in a modern society — to bolster the legitimacy of the courts.

Gajendragadkar's approach to Hindu law and his ambivalent relationship to the scriptures is well illustrated in *Madhavrao v. Raghavendrarao*.[102] This ruling, handed down in 1945, was also Gajendragadkar's first judgment on Hindu law as a justice of the Bombay High Court. The other judge on the division bench that decided the case was Harilal Kania, who later went on the become the first chief justice of India. The case involved the legitimacy of *sagotra* marriage or marriage within the same *gotra*. In essence, the case revolved around whether *sagotra* marriage was valid under Hindu

[102] (1945) 48 *Bombay Law Reporter*, 196.

custom. In a landmark 1868 case, *Collector of Madura v. Moottoo Ramalinga*,[103] the Privy Council had stated that "under the Hindu system of law, clear proof of usage will outweigh the written text of the law."[104] However, a custom, which was at variance with the written text of Hindu law, had to be ancient, certain and reasonable if it was to be recognized by the court. After going over several court rulings on the evidence to prove a custom, in *Madhavrao* Gajendragadkar concluded: "On these authorities, then, it seems to be fairly well established that if in a particular case the party pleading a custom has produced general evidence of a respectable and reliable character showing that the particular custom prevails among the community to which the witnesses belong, and that the observance of the custom is well known for a fairly long period of time, that evidence can be accepted in support of the custom pleaded."[105] By this yardstick, the Court ruled that the marriage in question — between a *sagotra* husband and wife belonging to Deshastha Brahmin community — was valid.

However, Gajendragadkar was not satisfied with proof that *sagotra* marriage was sanctioned by custom. In addition, he wanted to garner textual proof for this custom. At first, the very meaning of *gotra* was sought to be problematized by Gajendragadkar. Max Mueller was cited as saying, "*Gotra* or *kula* means a family, and the number of families that had a right to figure in the Brahmanic Peerage of India was very considerable… All Brahmanic families who keep the sacred fires are supposed to descend from the Seven Rishis… The eight *gotras*, which descend from these Rishis,

[103] (1868) 12 *Moore's Indian Appeals*, 397.
[104] Ibid., 436.
[105] *Madhavrao* at 215.

are again subdivided into forty-nine *gotras*, and these forty-nine branch off into a still larger number of families."[106] However, Gajendragadkar contested the standard interpretation of *gotra* by citing other authorities such as P.V. Kane and Karandikar. Kane is quoted in the judgment as stating, "The mass of material on *gotra* and *pravara* in the sutras, the puranas and digest is so vast and full of contradictions that it is almost an impossible task to reduce it to order and coherence."[107] Gajendragadkar's conclusion was that it was "impossible to accept the suggestion that in reference to the Brahmin families of today their *gotras* and *pravaras* represent anything like an unbroken line of descent from the common ancestors indicated by the names of their respective *gotras* and *pravaras*."[108]

When he considered the texts of Manu and Yajnavalkya, Gajendragadkar observed that the requirements on *gotra* were "recommendatory, rather than mandatory." Turning to Vijnanesvara's interpretation of *Mitakshara*, where marriage between persons of the same *gotra* is prohibited, Gajendragadkar dismissed it as inconsequential since it was based on the *mimansa* rule of interpretation. Gajendragadkar wrote, "Vijnanesvara's interpretation is based on the mimansa rule of interpretation… That rule is both artificial and irrational; and as I have already indicated, I would certainly not be prepared to adopt it as a safe guide in interpreting Sanskrit texts for the purpose of administering Hindu law."[109] In a lecture on the Hindu Code Bill delivered in 1951, Gajendragadkar reiterated, "It would be enough if

[106] Ibid., 218.
[107] Ibid., 219.
[108] Ibid., 220.
[109] Ibid., 222.

I mention that the whole theory underlying the view that *sagotra* marriages are invalid is fantastic in the extreme. If the history of the *gotra* and *pravara* is considered it would be clear to any dispassionate student that the prohibition against *sagotra* marriage is irrational."[110]

But eventually it was the "rational outlook" of contemporary Hindu society that, in Gajendragadkar's opinion in *Madhavrao*, overrode the scriptures.

> It is true that while dealing with questions like this, Courts have to construe the texts of Hindu law in the light of the explanations given by recognized commentators. But it must always be remembered that since the said commentaries were written, several centuries have passed by and during this long period the Hindu mode of life has not remained still or static. Notions of good social behavior and the general ideology of the Hindu society have been changing; with the growth of modern sciences and as a result of the impact of new ideas based on a strictly rational outlook of life, Hindu customs and usages have changed. The custom as to marriages between persons of the same *gotra* which I have held proved in this case is an eloquent instance in point. Between the letter of the law and *sadachar* – good conduct, according to the consciousness of the community – there is obviously great variance.[111]

Gajendragadkar's validation of custom as representing the "consciousness of the community" was, however, problematic. As a believer in the progressive rationalization and secularization of society Gajendragadkar preferred to privilege customs over the scriptures. But this could be a double-edged sword for Gajendragadkar when customs did not measure up to his rationalist expectations. This mismatch between Gajendragadkar's rationalist expectations and the mores of society was best expressed in his reaction to the prevalence of caste-based norms among Hindus.

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[110] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 254.
[111] *Madhavrao* at 224.

In the Satsangi case Gajendragadkar, as has been noted earlier, failed to comprehend why the followers of Swaminarayan could object to the entry of non-Satsangi Harijans into their temple. He labeled the fears of the Satsangis as stemming from "ignorance, superstition and misunderstanding." Though Gajendragadkar strongly supported legal recognition of custom he also believed that with regard to caste inequality the Hindus could be "inflexible and exclusive". Thus in *V.V. Giri v. D.S. Dora*[112] Gajendragadkar wrote:

> It is well known that a person who belongs by birth to a depressed caste or tribe would find it very difficult, if not impossible, to attain the status of a higher caste amongst the Hindus by virtue of his volition, education, culture and status. The history of social reform for the last century and more has shown how difficult it is to break or even to relax the rigor of the inflexible and exclusive character of the caste system. It is to be hoped that this position will change, and in the course of time the cherished ideal of casteless society truly based on social equality will be attained under the powerful impact of the doctrine of social justice and equality proclaimed by the Constitution and sought to be implemented by the relevant statutes and as a result of the spread of secular education and the growth of a rational outlook and of a proper sense of social values; but at present it would be unrealistic and utopian to ignore the difficulties which a member of the depressed tribe or caste has to face in claiming a higher status among his co-religionists.[113]

It should come as no surprise that Gajendragadkar was an enthusiastic votary of 'modernization' of Hindu law. In his lecture on the Hindu Code Bill, Gajendragadkar stated, "The first and obvious point on which there could be no difference is that the personal law which affects the lives of so many millions of Hindus should be made simple, clear and certain and this object can be achieved only by codifying the whole

[112] AIR 1959 SC 1318.
[113] Ibid., 1327.

of Hindu law. I suggest that there should be no difference of opinion that the personal law affecting all the Hindus should now be made also uniform."[114]

Importantly, Gajendragadkar's reformist thrust was not limited to Hindu law. Speaking well after the Hindu Code Bill had been passed, Gajendragadkar lamented, "It was then thought that the enactment of the Hindu Code, the provisions of which are founded on principles of justice, equity and good conscience, and on rational considerations consistent with the spirit of modernism, would soon herald a new era in which the Muslim personal law would likewise be modernized and placed on a rational footing, consistent with the spirit of modern times."[115] He also expressed a view on the 'secular' nature of personal laws that would be later echoed by the Supreme Court in cases related to Muslim personal law: "If a section of the Muslim community protests against legislative effort to modernize Muslim personal law, secularism says that, though the Muslims hold in veneration their religious texts, in the discussion and decision of the question pertaining to personal law, religious texts have no relevance because personal law is a secular and social matter."[116]

It is apparent that Gajendragadkar reposed a great deal of faith in social change set in motion by the Constitution and the state. Hence, he harbored the hope that the Court ruling in *Yagnapurushdasji* would "receive the spontaneous approval and response even from the traditionally conservative elements of the Satsang community."[117] Gajendragadkar's faith in a consensus on social issues stemmed from

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[114] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 292.
[115] Gajendragadkar, *The Philosophy of National Integration*, 40.
[116] Ibid., 44.
[117] *Yagnapurushdasji* at 1135.

his appraisal of Nehru's strategy. Gajendragadkar observes, "Nehru, however, never forgot the fact that in the matter of establishing social equality law can succeed quickly only if it receives the whole-hearted cooperation of public conscience."[118] This unerring belief in agreement on critical issues, according to Shklar, is "part of more general ideological movements in favor of unity, and of wider searches for political values transcending those of the competing groups."[119] Shklar writes, "The anxiety of the elite that possesses 'true political knowledge' or of the 'man on the Clapham bus' is understandable. It is, however, no argument in favor of laws and judicial decisions which rely on a myth of moral uniformity or which pursue an ideology of agreement at any price."[120]

Conclusion

Gajendragadkar was fond of quoting Cardozo when discussing jurisprudence and the role of courts. One of the many nuggets of Cardozo's legal wisdom that Gajendragadkar often quoted was, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the Judges by."[121] In the above discussion I have attempted to locate Gajendragadkar in the "great tide" of rationalism and modernism that was a dominant feature of the public discourse in Nehru's India. In addition to the Nehruvian ideology, Gajendragadkar was also significantly influenced by an instrumentalist conception of law and the use of law as "social

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[118] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 337
[119] Shklar, *Legalism*, 88.
[120] Ibid., 92.
[121] Gajendragadkar, *Indian Parliament and Fundamental Rights*, 182.

engineering." These two influences would leave their imprint on Gajendragadkar's rulings, be it on religious reform or personal law or Constitutional amendments. Though for Gajendragadkar the ideal or "wise" judge was one who could rise above his socio-economic philosophy, it should be evident from my analysis that Gajendragadkar's rulings were in fact a product of his rationalist and socialist ideology.

However, as mentioned earlier, it was possible for Gajendragadkar to view himself as a judge untouched by personal values because he believed his rulings represented what was best for the nascent Indian nation and was aimed at furthering the common good. Thus, Gajendragadkar felt he could use the instrumentalist idea of law in the service of the Nehruvian state. This was expressed by Gajendragadkar in a speech delivered in 1965 on the first death anniversary of Nehru: "Nehru always preached the basic theory that democracy could succeed in achieving its dynamic purpose of establishing an egalitarian society with the help of law, and so, according to Nehru's concept, law in the hands of democracy became its mighty weapon and ally."[122] Even after Nehru's death, when fundamental rights were being subverted by Indira Gandhi, Gajendragadkar retained his faith in the Nehruvian conception of the state and democracy.

Nehru's strong emphasis on rationalizing religion can be seen as part of his grand plan of giving India the "garb of modernity" by pulling the country "out of traditional ways of thought and living which, for all the good they may have done in

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[122] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 337.

the past age, and there was much good in them, have ceased to have significance today."[123] Bhikhu Parekh has argued that Nehru "felt convinced that India had no choice but to replace its 'degenerate' traditional social structure with one based on Western lines under the tutelage of the state led by a Westernized elite."[124] I have tried to show that Gajendragadkar was a committed votary of the Nehruvian model.

Religion was an important component of the "traditional ways" that so worried Nehru. However, Parekh argues that in his final years Nehru realized that his model of modernization was flawed and looked at ways of "traditionalizing modernity."[125] Parekh's point is borne out by some of Nehru's writings and speeches in the twilight of his life. During a lecture in 1959 Nehru spoke of the necessity of building the future on the "foundations laid in the past and in the present." He poignantly said, "To deny the past and break with it completely is to uproot ourselves and, sapless, dry up."[126] Two years later, there was a significant change in Nehru's beliefs on religion from the time when he penned *Discovery of India*. In 1961, Nehru wrote that he agreed with the approach that "we should accept the deeper essence of religion and, indeed, of all religions which may be called spirituality and not the rituals and dogmas that have grown up in the name of religion."[127]

On the part of Gajendragadkar there was no visible attempt to revise his life-long advocacy of modernism. However, Gajendragadkar's description of Hinduism as

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[123] Nehru, *The Discovery of India*, 510.
[124] Bhikhu Parekh, "Jawaharlal Nehru and the Crisis of Modernisation," in Upendra Baxi and Bhikhu Parekh eds., *Crisis and Change in Contemporary India* (New Delhi: Sage Publications, 1995), 22.
[125] Ibid., 53.
[126] Gopal, *Jawaharlal Nehru: An Anthology*, 227.
[127] Ibid., 575.

a "way of life" and the inadequacy of categorizing it as a religion in *Yagnapurushdasji* does provide pointers to a contrary approach to religion. The judgment has been discussed in detail in an earlier chapter.[128] In his out-of-court writings, Gajendragadkar clearly made the link between the "comprehensive, forward-looking and dynamic" aspects of Hinduism, symbolized by its catholicity, and the sustenance of secularism in India. He writes, "In understanding the true nature of the doctrine of Secularism under the Constitution of India, it is necessary to refer to the fact that this doctrine is fundamentally based on Hindu philosophy."[129] According to Gajendragadkar, the tolerance of dissent in the Hindu tradition makes it particularly conducive to secularism: "It is this characteristic catholicity and freedom which are the hallmark of Hindu philosophy, religion and culture; and it is this catholicity again, which is the basis of the spirit of tolerance in a positive sense, that is the special feature of Indian secularism. That is why I venture to suggest that the positive concept of secularism is ultimately based on the fundamental features of Hindu philosophy."[130] It has been noted in an earlier chapter how this inclusivist discourse on Hinduism can lend itself to interpretations that fail to recognize India's composite and syncretistic culture.

In the context of Gajendragadkar's philosophy it is important to note that his selective use of tradition — almost always Hindu tradition — co-exists uneasily with embrace of a modern rational world-view. On numerous occasions, Gajendragadkar

[128] Though Radhakrishnan was the primary source for describing Hinduism as a "way of life," Nehru's definition of Hinduism in *Discovery of India* was remarkably similar to Gajendragadkar's ruling: "Hinduism, as a faith, is vague, amorphous, many-sided, all things to all men. It is hardly possible to define it, or indeed to say definitely whether it is a religion or not, in the usual sense of the word." Nehru, 75.

[129] Gajendragadkar, *The Philosophy of National Integration*, 39.

[130] Ibid., 40.

spoke about the irrelevance of religion in the public sphere. Thus, to identify Hindu philosophy and traditions as the wellspring of tolerance does not quite fit with Gajendragadkar's general philosophy. The same can be said for Gajendragadkar's understanding of *dharma*. When discussing modernization of personal laws Gajendragadkar makes the point that *dharma* is a "purely secular institution."[131] He writes, "*Dharma*, in its secular sense, aims at stabilizing social institutions and human relations and so inevitably the rational test of social utility and the compelling considerations of social equality must be allowed to have their full sway in molding the structure of Hindu Law today."[132] This interpretation of *dharma* flies against the conception of *dharma* as "eternal laws which maintain the world"[133] or an "all-encompassing order"[134] where no sharp distinctions can be made between the sacred and the profane.

Hence, it would seem Gajendragadkar usually attempted to interpret tradition through modernist categories. Indeed this inability to comprehend 'traditional' and popular religious practices would represent a fundamental tension in Gajendragadkar's, as well as Nehru's, ideology. Even if one accepts Parekh's thesis that Nehru in his later years moved from a "mechanical and indiscriminate adoption of the Western model" to one that was "sensitive to the history, habits and values of his countrymen,"[135] there was still a wide gap between Nehru's talk of spirituality and

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[131] Mahajan, *Chief Justice Gajendragadkar: His Life, Ideas, Papers and Addresses*, 232.
[132] Ibid., 301.
[133] Robert Lingat, *The Classical Law of India* (New Delhi: Oxford University Press, 1998), 3.
[134] Madeleine Biardeau, *Hinduism: The Anthropology of a Civilization* (New Delhi: Oxford University Press, 1989), 42.
[135] Parekh, "Jawaharlal Nehru and the Crisis of Modernization," 53.

popular religion. In fact, as early as 1936, Nehru had expressed his deep admiration for the *Upanishads*: "Despite the woeful accumulation of superstition and degrading custom that had clung to her [India] and borne her down, she had never wholly forgotten the inspiration that some of the wisest of her children, at the dawn of history, had given her in the *Upanishads*."[136]

Interestingly, even here the trajectories of Nehru's and Gajendragadkar's philosophy intersected. It is perhaps no coincidence that Gajendragadkar's final project was editing the *Upanishads* for the Bharatiya Vidya Bhavan. In his introduction to the first volume, Gajendragadkar makes a rare departure from his hard rationalism to justify the relevance of the *Upanishads*: "If science and scientific progress are allowed to go without guidance and control of ethical considerations and become captives of political power, the world may face disaster."[137] At the same time Gajendragadkar admits there is a "disparity" between the teachings of the Upanishads and the beliefs and practices of the Hindu community. Thus he writes, "That, in one sense, is a challenge posed by the Upanisadic thought, if it has to appeal to the entire community, as relevant and work as a solace, in the lives of Hindus, as it did, in the case of the famous European philosopher Schopenhauer, who said: 'The Upanisads have been the solace in my life and will be the solace in my death.'"[138] This statement reflects a fundamental contradiction in Gajendragadkar's as well as the Nehruvian

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[136] Gopal, *Jawaharlal Nehru: An Anthology*, 28.
[137] P.B. Gajendragadkar ed., *The Ten Classical Upanishads* I (Bombay: Bharatiya Vidya Bhavan, 1981), 11.
[138] Ibid., 23.

world-view: the goal of convincing a community marked by a multiplicity of religious beliefs and practices to accept a rationalist and higher religion.

CHAPTER V

HOMOGENIZING RELIGION: THE COURT AND MINORITIES

In the last three chapters, the focus has been on the judicial discourse on Hinduism and Hindu religious practices. The emphasis on Hinduism has largely been prompted by the fact that the Indian state has been far more active in reforming Hindu religious institutions and practices than those of other religions. As noted earlier, the reformist tendencies that the state displays towards Hinduism flow directly from the Constitution, particularly the provision in Article 25 that permits the state to legislate for the social welfare and reform of Hindu religious institutions. There is no similar Constitutional provision regarding the larger minority religions in India such as Islam or Christianity. However, this has not meant that the religious institutions and practices of Muslims or Christians have been immune from state intervention.

In this chapter, I examine court rulings on the personal law of religious communities. It is an issue that has agitated the legislature and the courts since independence. In fact, the state's recognition of Islamic personal law and the dispute over the temple/mosque at Ayodhya continue to be the two most volatile issues pertaining to religion in the public sphere. Here, I look primarily at cases related to Muslim personal law. The Shah Bano case[1] in 1985 was the most spectacular

[1] *Mohd. Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

manifestation of the long-standing dispute over Muslim personal law. Two factors are particularly relevant for any discussion of Muslim personal law in the Indian context: The first is Article 44 of the Constitution – a non-justiciable directive principle which calls on the state to "secure for the citizens a Uniform Civil Code throughout the territory of India;" and the other is the fact that unlike Muslim personal law, which is governed by the Shariat Act of 1937, much of Hindu personal law has been codified and 'reformed' by the Hindu Code Bills (which consisted of four separate Parliamentary acts) of 1955-1956.[2]

I argue that the court's project of homogenizing religion comes across clearly in the personal law cases. In the cases involving Muslim personal law, the Supreme Court has clearly stated its preference for a uniform civil code. It has even gone to the extent of suggesting that personal laws have no place in "civilized society." The propensity of the courts to make practices of minority religions conform to a homogenized, rationalist model has had serious ramifications for Indian secularism. The court's intervention is crucial in what the Lloyd and Susanne Rudolph term the "contest between legal pluralism and legal universalism."[3] The Rudolphs define legal pluralism as a way of giving expression to India's "continuously and variously constructed multi-cultural society."[4] On the other hand, legal universalism "treats individuals as the basic unit of society and the state and imagines homogeneous

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[2] The Hindu Marriage Bill, Hindu Succession Bill, Hindu Minority and Guardianship Bill and Hindu Adoptions and Maintenance Bill. See Harold Levy, *Indian Modernization by Legislation: The Hindu Code Bill* (Ph.D. dissertation in Political Science, University of Chicago, 1973).
[3] Susanne Hoeber Rudolph and Lloyd I. Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context," 36.
[4] Ibid., 35.

citizens with uniform legal rights and obligations."[5] According to the Rudolphs, "Proponents of legal uniformity support a uniform civil code, and proponents of legal pluralism argue for minority rights in the form of diverse personal laws."[6] I will attempt to show that the court rulings on Muslim personal law have almost always been premised on legal universalism. Before examining these rulings, I will briefly outline the background to the uniform civil code and the reform of Hindu personal law.

Evolution of Personal Laws

The prevalence of separate personal laws for different religious communities can be traced to the initial years of British rule in India. One of the first things that the East India Company did after being granted the Diwani of Bengal, Bihar and Orissa in 1765 was to demarcate a separate sphere for religious laws, which comprised of personal laws, and another one for secular laws, which covered areas such as crime and commercial contracts.[7] The origins of this division can be traced to the famous 1772 regulation in which Warren Hastings, the first governor-general of India, directed that "in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the Mahomedans and those of the Shaster with respect to Gentoos shall be invariably adhered to."[8] If one

[5] Ibid., 36.
[6] Ibid., 36.
[7] Islamic criminal law ceased to be applied after 1862, when the Criminal Procedure Code of 1859 and the Indian Penal Code of 1860 were promulgated. The Islamic law of evidence lapsed after the Indian Evidence Act, 1872, came into effect.
[8] Courtney Ilbert, *The Government of India* (London: Clarendon Press, 1898), 392.

accepts the argument of the Rudolphs that legal uniformity and legal pluralism have contested for dominance in different eras of modern Indian history, then the 1772 regulation was a move to recognize group identities.

British rule, however, also saw consistent efforts to rationalize and modernize personal laws. Some of the legislation reforming Hindu practices such as the Sati Regulation of 1829, the Caste Disabilities Removal Act of 1850, the Widow Remarriage Act of 1856, the Child Marriage Restraint Act of 1929 and the various Gains of Learning Bills, have been mentioned in an earlier chapter. There was similar legislation with respect to Islamic law. In 1918, the Mapilla Succession Act was enacted by which customary law and inheritance among the Mapilla Muslims was replaced by "Muhammedan law." A similar law, the Cutchi Memons Act of 1920, was enacted for the Cutchi Memons. Another important law enacted in British India was the Dissolution of Muslim Marriages Act, 1939. This act was aimed at enabling Muslim women to dissolve their marriages under certain circumstances. Some other legislation passed during British rule were the Wakf Validating Act of 1913 and the Wakf Act of 1923, which were aimed at enforcing a large number of rules and regulations relating to management of wakf (a Muslim endowment) properties and keeping account and audit of their accounts. At the same time, the very act of British courts administering Hindu and Islamic personal law meant that parallel processes of rationalization and homogenization were also taking place. Gregory Kozlowski notes, "British imperial institutions: courts, law schools and administration, were the

agencies which came close to codifying Muslim Personal law, or as the people during the raj called it, 'Muhameddan Law'."[9]

By far the most important legislative intervention by the British with regard to Islamic personal law was the Muslim Personal Law (Shariat) Application Act[10], which was enacted in 1937 to replace customary law for marriage, divorce, succession and other family affairs. The codification of Islamic law was undertaken to replace customary law which did not have "any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in future the certainty and definiteness which must be characteristic of all laws." This had the effect of homogenizing Islamic personal law by wiping out personal laws of "minorities within Indian Islam": the Khojas, the Cutchi Memons, Bohras and the Malsan Muslims. Thus, the Rudolphs write, "Homogeneity was served powerfully in the nineteenth and twentieth centuries by three processes: changes in who administered the law; expansion of universal law by processes of codification; and the reformation and homogenization of personal law."[11]

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[9] Gregory C. Kozlowski, "Muslim Personal Law and Political Identity in Independent India," in Baird ed. *Religion and Law in Independent India*, 79.

[10] The statute says: "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, liam, khula and mubarat, maintenance, dower, guardianship, gifts, trust and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)

[11] Rudolph and Rudolph, "Living with Difference in India: Legal Pluralism and Legal Universalism in Historical Context," 51.

The Constituent Assembly Debates

The issue of separate personal laws and the desirability of a uniform civil code were intensely discussed in Constituent Assembly debates. According to John Mansfield, the "idea of a uniform civil code was first proposed during debate in the Constituent Assembly and its committees."[12] The debates in the Assembly pitted powerful voices demanding legal universalism against minority voices who pleaded for legal pluralism. The draft articles on justiciable rights proposed by both B.R. Ambedkar and K.M Munshi alluded to a uniform civil code. Ambedkar wrote that the citizens of independent India shall have the right "to claim full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by other subjects regardless of any usage or custom based on religion and be subject to like punishment, pains and penalties and to none other."[13] Munshi stated that no court shall recognize any "custom or usage."[14] When the Fundamental Rights Sub-Committee decided to make the uniform civil code a directive principle, Amrit Kaur along with two other members wrote, "[O]ne of the factors that has kept India back from advancing to nationhood has been the existence of personal laws based on religion which keep the nation divided into watertight compartments in many aspects of life."[15]

But when Article 44 (Article 35 of the Draft Constitution) came up for discussion in the Constituent Assembly, all the five Muslim members who participated

[12] John H. Mansfield, "The Personal Laws or a Uniform Civil Code?" in Baird ed. *Religion and Law in Independent India*, 139.
[13] B. Shiva Rao, *The Framing of India's Constitution: Select Documents* II (Nasik: Government of India Press, 1968), 89.
[14] Ibid., 79.
[15] Ibid., 162.

in the debate spoke against it. Mohammed Ismail Saheb wanted to include in the article the words "provided that any group, section or community of people shall not be obliged to give up its own personal law in case it has such a law,"[16] which would have defeated its purpose. Similarly Mahboob Ali Baig wanted to insert the following amendment: "Provided that nothing in this article shall affect the personal law of the citizen."[17] He argued, "People seem to think that under a secular state, there must be a common law observed by its citizens in all matters including matters of their daily life, their language, their culture, their personal laws. This is not the correct way to look at the secular state. In a secular state, citizens belonging to different communities must have the freedom to practice their own religion, observe their own life and their personal laws should be applied to them."[18]

Hussain Imam was the only Muslim to entertain the possibility of a uniform civil code, but even he was in favor of it only in the distant future. He said, "I feel that it is all right and a very desirable thing to have a uniform law, but at a very distant day. For that, we should first await the coming of that event when the whole of India has got educated, when mass illiteracy has been removed, when people have advanced, when their economic conditions are better, when each man is able to stand on his own legs and fight his own battles."[19]

The opposing viewpoint was forcefully articulated by Munshi. He said, "We are at a stage where we must unify and consolidate the nation by every means without

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[16] *Constituent Assembly Debates* VII, 540.
[17] Ibid., 541.
[18] Ibid., 544.
[19] Ibid., 546.

interfering with religious practices. If, however, the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point where we must put our foot down and say these matters are not religion, they are purely matters for secular legislation."[20] He added, "Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation."[21] Munshi also pointed out that that in none of the other "advanced" Muslim countries "the personal law of each minority has been recognized as so sacrosanct as to prevent the enactment of a Civil Code."[22]

During the debate, Ambedkar highlighted the fact there was a "uniform and complete criminal code" throughout the country. He stressed that a further step needed to be taken to take forward the secularization of the law. He said: "The only province the Civil Law has not been able to invade to invade so far is marriage and succession. It is this little corner which we have we have not been able to invade so far and it is the intention of those who desire to have article 35 as part of the Constitution to bring about the change."[23]

Ambedkar countered the Muslim insistence on personal laws by observing that a uniform Islamic personal law itself was a construct of British rule. Addressing the Muslim members, Ambedkar said:

> My first observation would be to state that members who have put forth these amendments (to the draft articles directed towards a common civil

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[20] Ibid., 574.
[21] Ibid., 548.
[22] Ibid., 547.
[23] Ibid., 550-51.

> code) say that Muslim personal law, so far as this country was concerned, was immutable and uniform through the whole of India... My honorable friends have forgotten that, apart from the North-West Frontier Province, up till 1937 in the rest of India, in various parts, such as the United Provinces, the Central Provinces and Bombay, the Muslims to a large extent were governed by the Hindu Law in the matter of succession. In order to bring them on the plane of uniformity with regard to the other Muslims who observed the Shariat Law, the Legislature had to intervene in 1937 and to pass an enactment applying the Shariat Law to the rest of India.[24]

Ultimately, Ambedkar and Munshi's arguments did not win the day. The Constitution "did not abolish the system of personal laws and require that there be a uniform civil code; it only held forth a uniform civil code as an ideal towards which the state should strive."[25] Robert Baird notes in his analysis of the Constituent Assembly Debates: "Article 44 is based on the assumption that the Indian secular state requires the secularization of law – that civil law should be the same for all Indians in order that nation building can continue and that all persons can be welded together equally into a modern Indian state. This requires that traditional religious expressions become modified so that they are more and more a matter of personal faith, and that the state mould a modern civil code based on justice and equality."[26] In a similar vein, Mansfield observes: "[O]nce the notion of a uniform civil code was put forward, it rapidly came to be accepted as an important part of the effort to construct an Indian national identity, over against the separate identities of caste, religion and ethnicity."[27] As will be seen in a subsequent section, the Supreme Court in its prominent rulings on

[24] Ibid., 551.
[25] Mansfield, "The Personal Laws or a Uniform Civil Code?", 140.
[26] Robert D. Baird, "Uniform Civil Code and the Secularization of Law," 172.
[27] Mansfield, "The Personal Laws or a Uniform Civil Code?", 140.

personal law, particularly *Shah Bano* and *Sarla Mudgal*, used this rhetoric of nationhood and national unity to advocate the uniform civil code.

The Hindu Code Bills

The Supreme Court was heavily influenced by the arguments, put forward during the debates on the reform of Hindu personal law, that the Hindu Code Bills must necessarily be a precursor to a uniform civil code. Following the 1935 Government of India Act, which empowered both the federal and provincial legislatures to make laws covering a wide range of activities, the Hindu Law Committee (Rau Committee) was in 1941 entrusted the task of reforming Hindu law. In 1944, the Rau Committee published a draft Code which "proposed many specific changes in personal relationships in the Hindu community."[28] According to Harold Levy, the draft Hindu Code Bill was "more far-reaching in its intended reforms, than all of the piecemeal legislation enacted in 1921-41 together."[29]

The controversial nature of the initial Hindu Code Bill was apparent not only in public protests but also through a minority report penned by Dwarkanath Mitter, one of the members of the four-man Rau Committee. Mitter wrote, "From a conspectus of the evidence and written opinions given in the whole of India through which the Committee had to tour, it will appear that the majority are against codification of Hindu law and it is only a microscopic minority that favors

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[28] Gene D. Overstreet, "The Hindu Code Bill," in Lucian W. Pye ed., *Cases in Comparative Politics: Asia* (Boston: Little Brown, 1970), 163.
[29] Levy, *Indian Modernization by Legislation: The Hindu Code Bill*, 356.

codification."[30] The divide over the Code would manifest itself in post-1947 debates in the Constituent Assembly (legislative) where the bill failed to pass despite Ambedkar's best efforts of. There was strong opposition within the Congress by leaders such as Pattabhi Sitaramayya and Rajendra Prasad, who as the President of India, threatened to use his veto power. It was only after the India's first general elections, when a Congress government under Nehru commanded a brute majority, that a Hindu Code in four separate Acts was passed in Parliament.

During the Parliamentary debates the question of confining personal law reform to Hindus only dominated proceedings. In fact, the Hindu nationalists and the Left parties were united in their criticism of exempting minority religions from reform. The Hindu Mahasabha's N.C. Chatterjee asked, "Why is this attempt to change the personal laws confined to Hindu society alone? Is not this communal legislation repugnant to the clear directive principles of the Constitution that there should be a uniform civil code for all citizens of India?"[31] At the other end of the spectrum, Acharya Kripalani of the Praja Socialist Party declared: "If we are a democratic state, I submit that we must make laws not for one community alone. Today the Hindu community is not as much prepared for divorce as the Muslim community is for monogamy… Will our government introduce a bill for monogamy for the Muslim community?"[32]

The criticism against singling out the Hindus was countered by a gradualist argument by the Congress government. Law minister H.V. Pataskar pointed out that

[30] Quoted in Baird, "Uniform Civil Code and the Secularization of Law," 179.
[31] Quoted in Levy, *Indian Modernization by Legislation: The Hindu Code Bill*, 286.
[32] Ibid., 286.

the bills "would apply to 85 per cent of the people, and would thus constitute a big step towards uniformity."[33] When queried about the inability of his government to enact a uniform civil code, Nehru replied: "I confess I do not think the time is ripe for me to push it through. I want to prepare the ground for it and this kind of thing is one method of preparing the ground."[34] In recent years, the Supreme Court has repeatedly expressed its disapproval of this gradualist approach and asserted that it is imperative that a common civil code be passed by the legislature.

Muslim Personal Law

One of the first cases in independent India where the question of separate personal laws for Muslims came up before the courts was the landmark *State of Bombay v. Narasu Appa Mali*.[35] In this case, the court used Nehru's logic of preparing the ground for a uniform civil code. In *Appa*, the validity of the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, was challenged before the Bombay High Court. At the outset, Bombay Chief Justice M.C. Chagla clearly stated that personal laws could be reformed in the interests of state policy: "If religious practices run counter to public order, morality or health or a policy of social welfare upon which the state has embarked, then the religious practices must give way before the good of the people of the State as a whole."[36] Hence, Chagla observed "even assuming that polygamy is a

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[33] Ibid., 290.
[34] Ibid., 290.
[35] AIR 1952 Bombay 84.
[36] Ibid., 86.

recognized according to Hindu religious practice, the right of the state to legislate on questions of marriage cannot be disputed."[37]

Chagla, however, conceded the validity of personal laws saying it was a "historic fact" that both Muslims and Hindus had their own personal laws "which are based upon their religious texts and which embody their own distinctive evolution and which are colored by their own distinctive backgrounds."[38] Chagla also pointed out that the inclusion of Article 44 in the Constitution itself was a recognition of "separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy privileges of a common uniform Civil Code applicable to all its citizen irrespective of race or religion."[39] Thus, the Court rejected the argument that Hindus were being discriminated against by using Nehru's logic of gradual reform: "One community might be prepared to accept and work social reform; another may not yet be prepared for it... The state may rightly decide to bring about social reform by stages and the stages may be territorial or they may be communitywise."[40]

Justice P.B. Gajendragadkar, in a concurring opinion, said that the Act did not violate equality before the law. Gajendragadkar wrote, "So long as the State Legislature in taking gradual steps for social welfare and reform does not introduce distinctions or classifications which are unreasonable, irrational or oppressive, it cannot be said that the equality before law is offended. The State Legislature may have

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[37] Ibid., 86.
[38] Ibid., 87.
[39] Ibid., 87.
[40] Ibid., 87.

thought that the Hindu community was more ripe for the reform in question."[41] However, Gajendragadkar stressed that personal laws were outside the purview of the fundamental rights of the Constitution and would have to give way to a uniform civil code in the future: "[T]he framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code."[42] Thus, both Chagla and Gajendragadkar exempted the Muslims from the bigamy act, but at the same time felt that a uniform civil would become reality in the future. It is this conviction that would be expressed in later court rulings on personal law.

A few years before the celebrated *Shah Bano* case, the Supreme Court in 1979 had to examine Muslim personal law in the light of the right of a divorced Muslim woman to seek maintenance from her husband. The first case was *Bai Tahira v. Ali Hussain Fidaalli Chothia*[43] where a divorced Muslim woman moved the court under section 125[44] of the Indian Code of Criminal Procedure. The petitioner argued that the *mahr* (dower) and maintenance during *iddat* (the three-month period after divorce) – the relevant provisions in Islamic law for divorced women – were inadequate to meet

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[41] Ibid., 95.
[42] Ibid., 92.
[43] (1979) 2 SCC 316.
[44] Section 125 of the CrPC which deals with the right to maintenance reads: (1) If any person having sufficient means neglects or refuses to maintain – (a) his wife, unable to maintain herself… a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife…, at such monthly rate not exceeding five hundred rupees in the whole…

her expenses. Speaking for the Court, Justice V.R. Krishna Iyer did not go into the merits of Islamic law. Instead he focussed on the provision in section 127(3)(b),[45] which says that a magistrate can cancel an order for maintenance if a divorced woman has received the "whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce." According to Iyer, payment of *mahr* was compatible with section 127. He, however, pointed out that any maintenance paid under customary law must be reasonable. Thus, he ruled in favor of the divorced woman: "The purpose of the payment 'under any customary law' must be to obviate destitution of the divorcee and to provide her with the wherewithal to maintain herself... There must be a rational relation between the sum so paid and its potential as provision for maintenance. To interpret otherwise is to stultify the project."[46] It is noteworthy that not once did Iyer mention Islam or the uniform civil code in his judgment.

A year later, Justice Iyer had occasion to deal with another case where a Muslim woman petitioned against inadequate maintenance. In *Fuzlunbi v. K. Khader Vali*,[47] the Court made two points. First, Iyer stressed that "Section 125-127 is a secular code deliberately designed to protect destitute women, who are victims of neglect during marriage and after divorce."[48] Second, he said, "Muslim law shows its

[45] Section 127(3)states: Where any order has been made under section 125 in favor of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that (b) the woman has been divorced by her husband, and that she has received, whether before or after the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, –
[46] *Bai Tahera* at 322.
[47] AIR 1980 SC 1730.
[48] *Fuzlunbi* at 1735.

reverence for the wife in the institution of *mahr* (dower). It is neither dowry nor price for marriage." Unlike *Bai Tahira*, Iyer analyzed the significance of *mahr* in Islamic law. The Court said, "The quintessence of *mahr* whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce."[49] Iyer's verdict was: "[E]ven by harmonizing payments under personal and customary laws with the obligations under Sections 125 to 127 of CrPC, the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount… This perspective of social justice alone does justice to the complex of provisions from Section 125 to Section 127 of the Criminal Procedure Code."[50]

The Supreme Court's intervention in Muslim personal law was far more controversial in the now famous *Shah Bano* case. In this case, Shah Bano, a divorced Muslim woman from Indore in Madhya Pradesh, sued her former husband Mohammed Ahmed Khan for not providing adequate maintenance under section 125. A lower court awarded Shah Bano a monthly payment of Rs 25, which was later raised to Rs 180 by the Madhya Pradesh High Court. The case was then taken up at the Supreme Court where Khan contended that he was not obliged to maintain his former wife under Muslim personal law since he had paid a *mahr* of Rs 3,000 plus maintenance for three months.

In the Supreme Court, Chief Justice Y.V. Chandrachud framed the case as illustrating a potential conflict between the civil and criminal laws of the country and

[49] Ibid., 1736.
[50] Ibid., 1736.

gender rights on one hand and Islamic law on the other. He wrote, "This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction."[51] Chandrachud concluded that that section 125 was not religion-specific in its scope, but "cut across barriers of religion."[52] He observed, "True, that they [provisions of a prophylactic nature] do not supplant the personal law of the parties, but, equally, the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussions on the applicability of such laws..."[53] This was very similar to Iyer's conclusion in *Fuzlunbi*: "Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127(3)(b) as much as it does Section 125."[54]

Next, the Court went on to enquire whether the right to maintenance of a divorced woman clashed with Muslim personal law. After citing two authoritative texts on Muslim law, the Court said, "[T]here is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to

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[51] *Shah Bano* at 946.
[52] Ibid., 948.
[53] Ibid., 948.
[54] *Fuzlunbi* at 1736.

maintain herself."[55] Chandrachud went even further and interpreted the Shariat to opine that the "Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife."[56] Finally, the Court examined Section 127(3)(b). Chandrachud referred to two standard texts on Muslim law to conclude that it was impossible to accept that *mahr* was the amount payable by the husband to his wife upon divorce. He wrote, "Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce."[57]

What distinguished *Shah Bano* from the two earlier cases, decided by Iyer, was the strong stand taken by the Court on the desirability of uniform civil laws. During the course of the judgment, Chandrachud regretted that Article 44 of the Constitution, which calls for a uniform civil code, had remained a "dead letter." Chandrachud linked the uniform civil code to "national integration" which he felt would remove "disparate loyalties to laws which have conflicting ideologies." He observed that though the state had the legislative competence to enact a common civil code, it lacked the "political courage" to do so. According to Chandrachud, the court had to take on the mantle of reformer: "Inevitably, the role of the reformer has to be assumed by the courts because it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable."[58]

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[55] *Shah Bano* at 951.
[56] Ibid., 952.
[57] Ibid., 953.
[58] Ibid., 954.

That the chief justice's opinion was not an isolated case of judicial activism was borne out by another judgment of the Supreme Court a few months later. *In Jorden Diengdeh v. S.S Chopra,*[59] the question at stake was a divorce filed by a Christian woman who was married under the Indian Christian Marriage Act, 1972. However, under the relevant legislation pertaining to divorce, the Indian Divorce Act, 1869, neither "mutual consent nor irretrievable breakdown of marriage" is a ground for divorce. This led the Court to observe, "Surely the time has come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste."[60]

The Uniform Civil Code

This thrust for uniformity of personal laws was more explicitly stated in *Sarla Mudgal v. Union of India,*[61] where an NGO and three women appealed to the Supreme Court to take action against men converting to Islam in order to marry a second time. Interestingly, the Court appealed to Hindu law, and not to notions of gender justice, to decide the case. Writing for the Court, Justice Kuldip Singh ruled that according to Hindu law as well as the Hindu Marriage Act, conversion to another religion did not have the effect of dissolving a Hindu marriage. Thus, a second marriage would violate Section 494 of the Indian Penal Code, which declares illegal a second marriage during the lifetime of a husband or wife.

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[59] AIR 1985 SC 935.
[60] Ibid., 940.
[61] AIR 1995 SC 1531.

The provisions of Hindu marriage law were used by the Court to press the case for a uniform civil code. "When more than 80% of the citizens have already been brought under the codified personal law," wrote Singh, "there is no justification whatsoever to keep in abeyance, any more, the introduction of 'uniform civil code' for all citizens in the territory of India."[62] Singh, however, did not stop at that. He wrote, "Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society." Singh contended that personal laws had nothing to do with religion and was a creation of British legislation during the time of Warren Hastings. Hence, the Court saw no problem in doing away with personal laws: "The Legislation – not religion – being the authority under which personal law was permitted to operate and is continuing to operate, the same can be superseded/supplanted by introducing a uniform civil code…"[63]

The Court went further and interpreted the Indian Constitution as divorcing religion from personal laws: "Article 25 guarantees religious freedom whereas Article 44 seeks to divest religion from social relations and personal law." It then singled out the Muslim and Christian communities for obstructing the uniform civil code: "The Hindus along with Sikhs, Buddhists and Jains have forsaken their sentiments in the cause of the national unity and integration, [while] some other communities would not, though the Constitution enjoins the establishment of a 'common civil code' for the whole of India."[64] In a concurring judgment, Justice R.M. Sahai wrote, "But

[62] Ibid., 1532.
[63] Ibid., 1539.
[64] Ibid., 1538.

religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms, are not autonomy but oppression."[65]

In 2003, the Supreme Court again articulated the need for a uniform civil code. *John Vallamattom v. Union of India*[66] revolved around a clause of the Indian Succession Act, 1925, which imposed certain restrictions on Christians who desired to bequeath property for religious and charitable purposes.[67] Speaking for the Court, Chief Justice V.N. Khare observed, "Section 118 of the Act imposes a restriction only on the Indian Christians. The said restriction is not applicable to the citizens belonging to other religions including Parsis. The short question, therefore, which arises for consideration is as to whether the said restriction imposed by Section 118 of the Act is a reasonable one."[68] After judging the evidence by the "touch-stone" of Article 14, which guarantees equality before the law, the chief justice held: "I find that Section 118 of the Act being unreasonable is arbitrary and discriminatory and, therefore, violative of Article14 of the Constitution."[69]

However, what made this ruling attract considerable media attention was the strident advocacy, like in *Sarla Mudgal*, of a uniform civil code.[70] Commenting on Article 44, the Court said, "The aforesaid provision [Article 44] is based on the premise that there is no necessary connection between religious and personal law in a

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[65] Ibid., 1540.
[66] 2003 SOL Case No. 338.
[67] Section 118 of the Act states: "No man having a nephew or niece or any nearer relative shall have the power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the will of living persons."
[68] 2003 SOL Case No. 338.
[69] 2003 SOL Case No. 338.
[70] The front page headlines in *The Telegraph* on July 24, 2003 read: "SC clears statute path for common civil code." The front page of *The Times of India* was more restrained: "SC favors common code."

civilized society."[71] Importantly, the chief justice specified that personal laws governing marriage or succession could not be brought within the freedom of religion clauses in the Constitution: "Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution." Finally, in an obiter dicta, reminiscent of *Shah Bano* and *Sarla Mudgal*, the Court said:

> It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.[72]

The Court has, however, not been consistent in its push for uniformity of personal laws. In *Madhu Kishwar v. State of Bihar*,[73] where the Court had to decide whether there should be parity between male and female tribals in intestate succession, the majority judgment ruled in favor of maintaining tribal laws. Speaking for the majority, Justice M.M. Punchhi observed that neither the Hindu Succession Act, Indian Succession Act nor Shariat law applied to the tribals. He wrote, "In face of these divisions and visible barricades put up by sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of

[71] 2003 SOL Case No. 338.
[72] Ibid.
[73] AIR 1996 SC 1864.

personal laws applicable to others, on an elitist approach or an equality principle, by judicial activism, is a difficult and mind-boggling effort."[74]

Clearly, the Court was willing to put on hold social reform and gender equality in deference to the sensibilities of the tribals, while it was unwilling to do so for Muslims. Interestingly, the Court in *Kishwar* was making an allowance for custom or tradition and not for religion-sanctioned personal laws. However, Justice Ramaswamy, who passed several crucial judgements on state administration of temples, dissented. He held that the general principles of justice, equity and good conscience must apply to tribals. Ramaswamy wrote, "Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act…"[75]

Conclusion

The Rudolphs point out that the idea of a uniform civil code has no single meaning, but can be characterized as a "multivalent signifier."[76] They identify five possible meanings for the uniform civil code: first, the colonial state's attempts to standardize and modernize law was an implicit move towards a common civil code; second, for the modernist nationalists, a uniform civil code was a means to promote national integration; third, for civil rights activists, a uniform civil code signified the

[74] Ibid., 1881.
[75] Ibid., 1879..
[76] Rudolph and Rudolph, "Living with Difference in India," 55.

empowerment of marginalized categories, especially women and minorities; fourth, for religious minorities, the uniform civil code was a direct attack on their personal laws and their cultural identity; and finally, for Hindu nationalists, a uniform civil code was a way to eliminate cultural differences. Indeed the paradoxical nature of the debate on the uniform civil code is illustrated by the fact that the 'secularists', who argue for legal uniformity, end up on the same side as that of the Hindu nationalists.

In the foregoing discussion I have attempted to show that the Supreme Court has consistently interpreted the uniform civil code as a means to unify the nation as well as to provide relief to women governed by oppressive personal laws. This has meant that the Court has usually ignored the fears of minority communities that a uniform civil code would pose a threat to their identity. In fact, the *Sarla Mudgal* ruling, delivered in the post-Babri Masjid period when Hindu nationalism was on the upswing, can be seen as an indictment of the Muslim minority for not conforming to the standardized laws of the nation. Hence, Madhu Kishwar notes: "This [*Sarla Mudgal*] is not exactly a legal judgment but more of a political sermon on how the Muslim minority should learn to behave and what ought to be its relationship to the Indian state… The insistence on a uniform civil code is a way of subjecting Muslims to a loyalty test. It is a way of asking them to prove that their allegiance to the Indian state and its laws stands above all other competing allegiances, especially to that of religion."[77]

[77] Madhu Kishwar, *Religion at the Service of Nationalism* (New Delhi: Oxford University Press, 1998), 235-236.

If the Supreme Court is a crucial player in this "continual negotiation" over the uniform civil code and personal laws, it is also not immune from prevalent political pressures. The *Danial Latifi v. Union of India*[78] ruling in 2001 is an example of how the Court diluted its own stand on personal laws. *Danial Latifi* can be seen as an interesting postscript to the Shah Bano ruling. In this case, the Muslim Women (Protection of Rights on Divorce) Act, 1986,[79] passed by the Congress government[80] in the aftermath of *Shah Bano*, was challenged before the Court. The approach of the five-judge bench deciding *Danial Latifi* was clearly stated by Justice S. Rajendra Babu: "Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on

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[78] 2001 SOL Case No. 567.

[79] The Statement of Objects and Reasons to the Bill read: This decision [Shah Bano] has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill, accordingly, provides for the following among other things, namely:-
(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period to *iddat* by her former husband and in case she maintains the children borne to her before or after the divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to *mahr* or dower and all the properties given to her by her relatives, friends, husband and husband's relatives…
(b) where a Muslim divorced woman is unable to maintain herself after the period of *iddat*, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law in the proportions in which they would inherit her property… But where a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

[80] The Act was passed by the Rajiv Gandhi government in the wake of the Muslim backlash to the *Shah Bano* ruling. One of the reasons for passing the legislation was to win back Muslim confidence in the Congress, which had suffered a heavy loss in a parliamentary by-election in the Muslim dominated Kishanganj constituency. The winning candidate, Syed Shahabuddin, made the *Shah Bano* ruling and the victimization of the Muslims the centerpiece of his campaign. Thus, an editorial in *The Times of India* on February 28, 1986, said that in passing the Bill, the Congress "was desperately keen to win back the Muslim vote which was supposed to have been alienated partly as a result of the Shah Bano affair."

considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints."[81] But in its final ruling the Court deviated from this position of legal universalism.

In *Danial Latifi*, the Court was primarily concerned with sections of the Muslim Women's Act which dealt with the amount and period of maintenance to be paid by a Muslim husband to his divorced wife; and the role of the community, particularly the wakf boards, in paying maintenance to a divorced Muslim woman. Regarding the period of maintenance, the Court said that the "purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of *iddat*."[82] At the same time, the Court held that "nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."[83] On whether the Act conformed to the *Shah Bano* ruling, Rajendra Babu said, "All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analyzed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case."[84]

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[81] 2001 SOL Case No. 567.
[82] 2001 SOL Case No. 567.
[83] 2001 SOL Case No. 567.
[84] 2001 SOL Case No. 567.

With regard to the involvement of the wakf boards, the Court said that the provisions of the Act providing for "maintenance to be paid by the former husband only for the period of *iddat* and thereafter to make her run for pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC."[85] The Court further observed that these provisions infringed Articles 14 and 15 of the Constitution: "The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion."[86] Having said this, the Court still upheld the Act on the ground that the legislature did not intend to enact "unconstitutional laws."

> It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws.[87]

Danial Latifi was a rare instance of the Court deviating from its customary emphasis on legal uniformity. It is noteworthy the deviation was not justified by legal pluralism or the rights of minorities, but by a technical 'rule of construction.'

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[85] 2001 SOL Case No. 567.
[86] 2001 SOL Case No. 567.
[87] 2001 SOL Case No. 567.

However, as a whole in the cases dealing with personal law, the courts have consistently sought to distance religion from civil law. By subordinating religious laws to the goal of a common civil code, the courts have not only tried to marginalize religion in the public sphere but also eliminate minority rights based on religious identity. In doing this, the Court has echoed some of the influential voices in the Constituent Assembly such as Ambedkar and Munshi. The Court's rationale for the uniform civil code has been predicated on the understanding that a unified substantive law is a defining characteristic of a true nation-state.

By pushing for a uniform civil code, the Court has either ignored or downplayed what Mansfield calls "identity value", which he defines as the value of "an ethnic or religious group within a territorial state being able to maintain its distinctive identity and through this its members' sense of existing and having meaning."[88] According to Mansfield, a "permissible reading of Article 44 leaves open for consideration the weight and persuasiveness of the identity value, as it is presented in the Indian context."[89] But the Court has chosen to view the debate about the uniform civil code versus personal law as a "zero-sum conflict."[90] Thus, the Court rulings in *Shah Bano* or *Sarla Mudgal* have threatened the cultural identity of Muslims and the standing of minority rights in Indian democracy, and in doing so strengthened the hand of Hindu nationalists.

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[88] Mansfield, "The Personal Laws or a Uniform Civil Code?", 175.
[89] Ibid., 175.
[90] Rudolph and Rudolph, "Living with Difference in India," 56.

CHAPTER VI

CONCLUSION: THE FRANKENSTEIN EFFECT

The Supreme Court's understanding of religion is best captured by James Scott's concept of high modernism. Some key components of Scott's formulation of modernism are a supreme confidence in progress and a rationalist understanding of the world. It has been argued in the preceding chapters that the majority of the Supreme Court rulings under discussion have looked at religion through a rationalist lens and have tried to cleanse it of what the court regarded as irrational practices. In that sense, the judicial discourse on religion has close affinities to Scott's high modernism.

The faith reposed by high modernism in progress and rationality implies a "truly radical break" with history and tradition. For the high modernists, according to Scott, the "structures of the past were typically the products of myth, superstition, and religious prejudice. It followed that scientifically designed schemes for production and social life would be superior to received tradition."[1] Hence Scott points out: "The temporal emphasis of high modernism is almost exclusively on the future. Although any ideology with a large altar dedicated to progress is bound to privilege the future, high modernism carries it to great lengths. The past is an impediment, a history that must be transcended: the present is the platform for launching plans for a better

[1] James C. Scott, *Seeing Like a State*, 93-94.

future."[2] In this respect, too, the thrust of the Supreme Court rulings mirrors Scott's conception. This is especially true for a figure like Justice P.B. Gajendragadkar, who is a leitmotif of this study. Gajendragadkar's crusade against religious superstition and myths, particularly through the construction of a rationalist Hinduism and the application of the essential practices doctrine, can be seen as typical of a high modernist. To use Foucault's terminology, Gajendragadkar becomes a "founder" of discursivity for the Court.

Like Scott, Michael Oakeshott points out that a disdain for the past is representative of rationalists. Oakeshott identifies the disposition of the rationalist thus: "At bottom he [the Rationalist] stands (he always *stands*) for independence of mind on all occasions, for thought free from obligation to any authority save the authority of 'reason'. His circumstances in the modern world have made him contentious: he is the enemy of authority, of prejudice, of the merely traditional, customary or habitual."[3] According to Oakeshott, since tradition or custom has no value for rationalists, it makes "destruction and creation easier for him to understand and engage in." This makes the rationalist a zealous supporter of change. Oakeshott writes of the rationalist: "He does not recognize change unless it is self-consciously induced change, and consequently he falls easily into the error of identifying the customary and the traditional with the changeless."[4]

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[2] Ibid., 95.
[3] Michael Oakeshott, "Rationalism in Politics," in *Rationalism in Politics and Other Essays* (New York, Basic Books, 1962), 1.
[4] Ibid., 4.

In the high modernists' scheme of things the state plays a central role. Scott observes, "High modernism is thus a particularly sweeping vision of how the benefits of technical and scientific progress might be applied – usually through the state – in every field of human activity."[5] Scott argues that it was only in the late nineteenth and twentieth century that the state acquired the wherewithal to impose its schemes on society. He further argues that the "massive, state-enforced social engineering of the twentieth century has been the work of progressive, often revolutionary, elites." Indeed, Gajendragadkar – and his intellectual mentor Jawaharlal Nehru – fit Scott's description of progressive elites who desire to use the power of the state to "bring about enormous changes in people's habits, work, living patterns, moral conduct, and worldview."[6]

This tendency towards social engineering, according to Oakeshott, is a feature of rationalist politics. He writes, "That anything should be allowed to stand between a society and the satisfaction of the felt needs of each moment in its history must appear to the Rationalist a piece of mysticism and nonsense. And his politics are, in fact, the rational solution of those practical conundrums which the recognition of the sovereignty of the felt need perpetually creates in the life of a society."[7] Alongside social engineering, rationalists are driven by a quest for perfection. Scott points out that this is a characteristic of high modernists, too, since "social engineers consciously set out to design and maintain a more perfect social order. An Enlightenment belief in

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[5] Scott, *Seeing Like a State*, 90.
[6] Ibid., 89.
[7] Oakeshott, "Rationalism in Politics," 5.

the self-improvement of man became, by degrees, a belief in the perfectibility of social order."[8]

The close fit of the Nehruvian elite with high modernism is not surprising since Scott notes that high modernism has great appeal to those who see themselves as responsible for nation-building and social transformation. According to Scott, "Where this intelligentsia conceives of its mission as the dragging of a technically backward, unschooled, subsistence-oriented population into the twentieth century, its self-assigned cultural role as educator of its people become doubly grandiose."[9] Thus, postcolonial elites such as Gajendragadkar, who sought to radically transform society, are particularly apposite candidates for high modernism.

> One might in fact speculate that the more intractable and resistant the real world faced by the planner, the greater the need for utopian plans to fill, as it were, the void that would otherwise invite despair. The elites who elaborate such plans implicitly represent themselves as exemplars of the learning and progressive views to which their compatriots might aspire. Given the ideological advantages of high modernism as a discourse, it is hardly surprising that so many postcolonial elites have marched under its banner.[10]

This study has attempted to highlight the strong current of high modernism and rationalism in the judicial discourse on religion. This, I argue, has contributed to a homogenization of religion as well as of the nation. I have analyzed these currents at three specific locations. First, the Supreme Court's inclusivist definition of Hinduism put forward the idea of Hinduism as an all-encompassing but coherent whole. The Court's description of Hinduism as a 'way of life' was based on the idea that there

[8] Scott, *Seeing Like a State*, 92-93.
[9] Ibid., 96.
[10] Ibid., 96.

were certain foundational features of Hinduism, one of them being the centrality of the Vedas. Hence, in rejecting the claim of the Satsangis that they were distinct from the Hindus, the Court in *Yagnapurushdasji* appealed to the idea of a "subtle indescribable unity" underneath the "divergence" of Hinduism. The appeal to a unity within Hinduism, based on a Vedic core, allowed the Court to ignore the issue of the multiplicity of sects and beliefs within Hinduism. This inclusive conception of Hinduism would also enable the Court to deny the right of exit or of a separate existence to any sect or group.

Second, through the essential practices doctrine, outlined by Justice B.K. Mukherjea in *Shirur Mutt* and developed by Justice Gajendragadkar in later rulings, the Supreme Court put in place a stripped down rationalist version of religion. In *Durgah Committee*, the Court made a distinction between 'essential' religion and practices that had their origins in superstitious belief. This ruling was a powerful statement in favour of rationalizing and homogenizing religion. Over four decades later, Justice K. Ramaswamy in *A.S. Narayana* stated that "secularism denounces super-naturalism and superstitious beliefs." At the same time newer religious groups such as the Ananda Margis were held by the Court to be illegitimate. The rationalization process would also find expression in increasing state regulation of temples and rituals of worship. The Court even went to the extent of ruling in *Swami* that the appointment of a temple priest was not a matter of religion. This meant that the Court was sanctioning a system where the state had a direct say in how worship was to be conducted.

Finally, in the Muslim personal law cases, the Supreme Court has, echoing influential voices in the Constituent Assembly, made a strong argument against separate laws for religious minorities. On several occasions, including the Shah Bano case, the Court has strongly pushed for a uniform civil code. The Court viewed the failure of the legislature to enact a uniform civil code as an invitation to don the mantle of reformer. The Court based its rulings on the premise that separate laws for religious communities undermined the nation-state and its unity. In *Sarla Mudgal*, the Court interpreted Article 44 as saying that personal laws have no place in "a civilized society."[11]

Paradox of Judicial Intervention

The high modernist and rationalist thrust of the court, however, failed to accomplish what it set out to achieve: the transformation, in Gajendragadkar's words, of a "traditional" community into a "modern, progressive and dynamic" one where reason would be the guiding principle and religion would be "totally irrelevant in the consideration of social, economic and political problems." Instead, in the three interventions described above court achieved what is best described as a 'Frankenstein effect.' Frankenstein, it will be remembered, was the artificial monster that slipped out of the control of and ultimately destroyed its creator in the novel by Mary Wollstonecraft Shelley.[12] The court's modernism and rationalism was turned on its

[11] AIR 1995 SC 1538.
[12] Mary Shelley, *Frankenstein: Or the Modern Prometheus* (Chicago: University of Chicago Press, 1982).

head, resulting in the complete negation of what a Nehruvian rationalist like Gajendragadkar had originally set out to achieve. This was most starkly illustrated in Gajendragadkar's definition of Hinduism that was used by the court, and subsequently appropriated by the Hindu nationalists, to legitimize Hindutva, the fundamentalist ideology of Hindu nationalists.

As has been touched on earlier, the overlap between the inclusivist and exclusivist discourses on Hinduism – where differences within Hinduism were appropriated rather than recognized – was at the root of this paradoxical outcome. The moment the Supreme Court in *Prabhoo* ruled that speaking about Hindutva in election campaigns was not religious speech because Hindutva is about "a way of life," it articulated Hinduism in a way that would be equally useful to Hindu nationalism as to high modernism. It is a 'Frankenstein moment' because the perfection of religion via Vedic rationalism projected as the doctrine of "a way of life" inverts Vedic rationalism in ways that legitimize a version of popular nationalist religion, Hindutva, that threatens to destroy rationalist Vedic Hinduism. It must be remembered that Nehruvians such as Gajendragadkar were deeply preoccupied with nation-building and that dictated much of their homogenizing project. However, this propensity toward homogenization reinforces the Hindu nationalist dual project, unifying and monotheizing Hinduism on the one hand and subsuming all religions under the umbrella of Hindutva as a way of life on the other.

The consequences of the essential practices doctrine were also not in consonance with the goals of Nehruvian modernism. The essential practices doctrine,

as developed by Gajendragadkar, sought to cleanse religion of superstition and irrationalities. It was based on the premise that the state must protect only the "essential and integral part" of religion. But to ensure this, the Supreme Court permitted the state to become deeply involved in administering religious institutions and even regulating rituals and modes of worship. Beginning with *Durgah Committee*, the Court gave sanction for an elaborate regulatory apparatus for religious institutions. The involvement of the state in religious institutions flew in the face of the Nehruvian assumption that the domain of religion would gradually shrink. Instead of religion disappearing from the public sphere the state became the principal agent of Hindu reform.

In the third intervention discussed above, the Supreme Court's repeated calls for a uniform civil code in cases involving the Muslim and Christian personal law has not had the desired effect. The Shah Bano case was a dramatic instance of a Court ruling triggering a backlash from the Muslim community as well as remedial action by the legislature. The ruling coalesced both traditionalist and modernist elements of the Muslim community, who saw their religious and cultural identity under threat. The reaction to the Court's emphasis on uniformity and homogeneity was so strong that the Congress passed the Muslim Women's Act to nullify the Shah Bano ruling. Under the Act, maintenance was to be paid to a divorced Muslim according to the provisions of Islamic law. In the case of a divorced woman not being able to maintain herself after the period of *iddat*, her relatives and in the last resort the Wakf Board were made responsible for the upkeep of the woman. This made the community, rather than state

institutions, responsible for the maintenance of a Muslim divorcee, defeating the intent of *Shah Bano*. Ironically, even as the Court hangs on tenaciously to the uniform civil code, as is evident from *Valamattom*, both Hindu nationalists and women's rights activists have been backing off the code.

The most paradoxical aspect of the judicial discourse was that the Court rulings became part of the ideological armory for the Hindu nationalists. The Hindutva ruling was obviously welcomed by the Hindu nationalists, but what is of greater interest is the way that Gajendragadkar's line of argument closely approximated the ideology of the Jan Sangh and the BJP. Sarvepalli Radhakrishnan's idea of Hinduism as a "way of life," which was given the Court's seal of approval in *Yagnapurshdasji*, was used by the Hindu nationalists to argue that Hinduism was not a religion but a "culture and tradition." From this position, a Hindu ideologue like Balraj Madhok could extrapolate that Hindutva was a "way of life and cultural tradition in which different beliefs and thoughts have been flourishing and coexisting" for centuries. A similar logic was used by Justice J.S. Verma to legitimize the use of Hindutva in election campaigns. Of course, as has been pointed out earlier, Verma went further and equated Hindutva with 'Indianness'. This would then be used by the BJP to proclaim that Hindutva and Indianness were one and the same thing.

If the inclusivist version of Hinduism became an integral component of the ideology of the Hindu nationalists, the Court's strident advocacy of a uniform civil code also made it an ally of the Sangh Parivar. The uniform civil code has consistently been at the top of the agenda – which includes scrapping of the special status granted

to Kashmir, a temple at Ayodhya and stemming Christian conversions – of Hindu nationalists. Here, too, it is noteworthy that at a theoretical level the Hindu nationalists echo the Court's stress on uniformity and antipathy to religion-based personal laws. One of the more prominent contemporary Hindu nationalist ideologues, Arun Shourie, argues: "The individual should be the unit for policies and laws of the State, and not the religion or caste to which he belongs or the region in which he lives;...nothing should be conceded to a group or organization of one religion which is denied to or not made available to groups or organizations of other religions."[13] Following the Shah Bano ruling, Shourie stated "no religious or other group has any inherent or perpetual right to insist that it will be governed by laws different from laws that apply to the generality of citizens."[14]

The 'legal universalism' inherent in Court rulings on personal laws became an integral part of the rhetoric of Hindu nationalists. The reasoning of Hindu nationalist ideologues such as Shourie highlights the possibility of a cognitive collaboration between Hindutva and Nehruvian secularism. Thus, Partha Chatterjee notes, "[I]n its most sophisticated forms, the campaign of the Hindu right often seeks to mobilize on its behalf the will of an interventionist modernizing state, in order to erase the presence of religious or ethnic particularism from the domains of law or public life, and to supply, in the name of 'national culture', a homogenized content to the notion of citizenship."[15]

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[13] Arun Shourie, *A Secular Agenda* (New Delhi: ASA Publications, 1993), ix.
[14] Shourie, "The Shariat," *The Illustrated Weekly of India*, 5 January (1986), 10.
[15] Partha Chatterjee, "Secularism and Tolerance," in Bhargava ed., *Secularism and Its Critics* (New Delhi: Oxford University Press, 1999), 347.

Judicial Activism

It has been noted how the idea of social engineering played a crucial role for high modernists such as Gajendragadkar. The notion of the "felt needs" of society or the "mores of the times" is central to the notion of social engineering. Hence, in an earlier chapter I have tried to show that Gajendragadkar's rulings can be viewed as a product of Nehruvian rationalism. Thus, when he talked of social engineering, Gajendragadkar meant achieving the goal of the Nehruvian welfare state: socio-economic justice. Gajendragadkar assumed a moral consensus, which is characteristic of political elites, on the Nehruvian objectives. But at another time, when Hindu nationalism was on the ascendancy, Verma used Cardozo's idea of "mores of the community" to achieve a completely different end. Gary Jacobsohn points out, "For Justice Verma, secularism means equal treatment under law, whereas for Justice Gajendragadkar, the constitutional aspiration of equality may justify the active intervention by the State into the spiritual domain (in violation, perhaps, of formal equality) in order to achieve an objectively more egalitarian society."[16] According to Jacobsohn, in the Hindutva ruling, "Gajendragadkar's discussion of Hinduism was appropriated by Verma in order to advance an understanding of religion and politics that is sharply divergent from the intentions of the earlier jurist."[17]

It can be argued that Verma's ruling was representative of the politics of the time when Hindu nationalists had acquired a legitimacy and popular support unrivalled since Indian independence. Hence, Jacobsohn writes, "Verma's

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[16] Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context*, 208.
[17] Ibid., 208.

unwillingness to delegitimate all Hindutva campaign advocacy is accordingly a reflection of his intention to reinforce what he saw as the legitimate sociopolitical aspirations that many people associate with the use of the term."[18] Framing the Hindutva judgment in terms of Cardozo's notion of community mores, Jacobsohn observes, "In looking to the mores of the majority, Verma appealed to a rather vague and undifferentiated set of norms and assumptions that reflect the aspirations for a uniform culture held by many, perhaps most Hindus in India." [19]

S.P. Sathe, too, links the changes in the direction of Court rulings with the politics of the time. Of the years immediately following independence, Sathe comments: "The Court, barring a few property rights cases, supported the economic regulation undertaken by the Indian State. During the 1950s and early 1960s, the Court seemed to share the Nehruvian vision of socialist India, as evident in its decisions on the rights of industrial labor and regulation and control of the economy."[20] However, of the 1990s, when Hindu nationalism and economic liberalization were the dominant themes in Indian politics, Sathe writes, "The tides and currents which engulf the rest of the people, do not pass the judge by. Therefore, there have been decisions which showed that even judges have not been left out of the prevailing climate of privatization and soft Hindutva."[21]

Besides the possibility of judges being influenced by the prevailing social and political context, Supreme Court judges have shown a willingness, which is rare for

[18] Ibid., 219.
[19] Ibid., 219.
[20] Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits*, 6. It must be noted, however, that Sathe underestimates the court's obstreperousness in the 1950s regarding land reform.
[21] Ibid., xxxix.

constitutional democracies, to interpret religious texts. One reason for this could be the tendency of judges to see themselves as inheritors of the Brahmanical tradition of interpreting religious texts. It is perhaps no accident that Gajendragadkar hailed from a family of Brahmin, Sanskrit scholars and took great pride in interpreting Hindu law, as is evident in *Madhavrao*. Similarly, Justice Ramaswamy (incidentally a Brahmin too) goes to great lengths in *A.S. Narayana* to show his knowledge of Hindu religious texts and traditions. This leads the other judge on the Bench, Justice B.L. Hansaria, to comment, "It may look pedantic to say anything more in the face of the very scholarly and erudite judgment of my learned brother…"[22]

Another reason for judges to refer to Hindu scriptures and traditions, as Pratap Bhanu Mehta points out, is a "way of bolstering their authority by giving Hindus reasons that are internal to the tradition itself to go along with the courts and legislature's reform agenda."[23] According to Mehta, "The act of interpreting religious texts have a dual purpose. On the one hand the courts are able to demonstrate that the authority of their rulings rests both upon modern constitutional principles and scripturally sanctioned foundations. On the other hand the courts offer internal reasons to Hindus to the effect that there is little in the content of social reform efforts that is a threat to their religion, understood in its essentials."[24] The contradiction of judges interpreting religious texts was not so apparent so long as the courts stuck to interpreting Hindu texts and traditions. But as soon as the courts and Hindu judges

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[22] *A.S. Narayana* at 1805.
[23] Pratap Bhanu Mehta, *Passion and Constraint: Courts and the Regulation of Religious Meaning*, 8.
[24] Ibid., 13

took on the role of interpreting Islamic law, as Justice Chandrachud did in *Shah Bano*, there was a huge outcry. Indeed, there are commentators who feel that had Chandrachud not referred to the Quran in *Shah Bano* to justify maintenance for divorced Muslim women, the case would not have taken such a controversial turn. Interestingly, when Justice Chagla, a Muslim, had to decide on the legitimacy of anti-polygamy legislation in *Appa*, he admitted, "It is only with very considerable hesitation that I would like to speak about Hindu religion…"[25] Instead of dwelling on the place of polygamy in Hindu religion, Chagla focussed on the right of the state to undertake social reform. Like Chagla, Justice Iyer, too, avoided the pitfall of interpreting Muslim personal law in *Fuzlunbi* and *Bai Tahera* and thus averted creating a furor as in *Shah Bano*.

Waiting for the Mahatma

The focus of this study has been on how the Supreme Court has contributed to the legalization of religion by the process by defining religion and specifying what is a legitimate expression of religion in the public sphere. I have tried to show that by virtue of a modernist and rationalist understanding employed in the legalization of religion, the Court has not only curbed freedom of religion but also undermined a pluralist conception of the nation. This view is at variance with influential voices, such as Gurpreet Mahajan, who argue that the intervention of the state in the religious sphere has been limited. According to Mahajan, "The Indian Constitution as well as

[25] *Appa* at 86.

subsequent interventions of the Supreme Court have tried to ensure that religious organizations and groups are not discriminated against in the public domain."[26] She writes, "[T]he primacy accorded to religious practice by the Constitution and the Supreme Court has severely limited the 'modernizing interventions' of the Indian state. With the singular exception of removing untouchability, religious practices have not been 'reformed' by state intervention. If anything they have been legitimized and protected in most instances."[27]

There are other scholars who have argued exactly the opposite. Dhavan and Nariman point out, "[B]oth the government and judiciary tend to overlook the simple fact that under the guise of regulatory control, religious endowments are, and have been, nationalized on a massive scale... The nationalization of religious endowments, temples and places of learning sits uneasily with both the guarantee of religious freedom and secularism."[28] They add, "Religious faiths have to be run by their followers and not by bureaucrats. The followers have to emerge from the faith and not be appointed by the State or statute."[29] It should be evident that the findings of this study are broadly in agreement with the Dhavan-Nariman view.

However, the larger point made in this study is how the judicial discourse has been shaped by a rationalist and modernist understanding of religion. This discourse has not only privileged homogenization of religion but of the nation as well. This has

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[26] Gurpreet Mahajan, *Identities and Rights: Aspects of Liberal Democracy in India* (New Delhi: Oxford University Press, 1988), 69.
[27] Ibid., 71-72.
[28] Dhavan and Nariman, "The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantaged Communities," 262-3.
[29] Ibid., 263.

made the Court and the Hindu nationalists unwitting allies. I have termed this alliance a Frankenstein moment because it completely subverted the goals of modernists and rationalists such as Justice Gajendragadkar. The deification of science, as represented by Victor Frankenstein in Shelley's novel, created a monster that went out of control. So also the rationalist and modernist judicial discourse has spawned reactionary and intolerant ideologies.

A crucial element of the judicial discourse has been its inability to comprehend non-rational elements of religious faith and its constant attempt to fashion religion in a way that a modernist state would like it to be rather than accept religion as represented by its practitioners. This, according to Ashis Nandy, is characteristic of the modern state. "The modern state always prefers to deal with religious ideologies rather than with faiths," he writes. "It is wary of both forms of religion but it finds the ways of life more inchoate and, hence, unmanageable, even though it is faith rather than ideology that has traditionally shown more pliability and catholicity."[30] This distrust of religious faith, that could be potentially chaotic and unruly, would find expression in the Court's definition of Hinduism, based on Vedic rationalism, and the essential practices test. This has meant that the person who epitomized religious tolerance in modern India – Mahatma Gandhi – has been a conspicuous absence in the judicial discourse. It is ironical that a mention of Gandhi had to wait till the concluding lines of this study. But that is perhaps symbolic of the nature of the judicial discourse which has been hostile to popular religion.

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[30] Ashis Nandy, "The Politics of Secularism and the Recovery of Religious Tolerance," in Bhargava ed., *Secularism and its Critics*, 322-23.

Gandhi, like Radhakrishnan, thought of Hinduism as an "all-embracing inclusiveness."[31] However, Gandhi's understanding of Hinduism differed markedly from Radhakrishnan's: "[I] feel for and about Hinduism with all its faults and limitations. Nothing elates me so much as the music of the *Gita* or the *Ramayana* by Tulsidas, the only two books in Hinduism I may be said to know… I am a reformer through and through. But my zeal never takes me to the rejection of any of the essential things of Hinduism."[32] Gandhi goes on to say that Hinduism is "not an exclusive religion" and that it "tells everyone to worship God according to his own faith or dharma, and so it lives at peace with all the other religions."[33] It is this pluralist conception of Hinduism, and indeed religion in general, that is anathema to both Nehruvian rationalists as well as Hindu nationalists.

[31] Mahatma Gandhi, *What is Hinduism?* (New Delhi: National Book Trust, 2001), 2.
[32] Ibid., 7-8.
[33] Ibid., 8.

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